Biennial Report

OF THE

Attorney General

OF THE

State of Colorado

Years 1915 and 1916

FRED FARRAR
Attorney General

DENVER, COLORADO
SAMES BROTHERS, STATE PRINTERS
1917

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ATTORNEYS GENERAL OF COLORADO

FROM THE ORGANIZATION OF THE STATE

A. J. Sampson	1877-1878
Charles W. Wright	1879-1880
Charles H. Toll	1881-1882
David F. Urmy	1883-1884
Theodore H. Thomas	1885-1886
Alvin Marsh	1887-1888
Samuel W. Jones	1889-1890
Joseph H. Maupin	1891-1892
Eugene Engley	1893-1894
Byron L. Carr	1895-1898
David M. Campbell	1899-1900
Charles C. Post	1901-1902
Nathan C. Miller	1903-1906
William H. Dickson	1907-1908
John T. Barnett	1909-1910
Benjamin Griffith	1911-1912
Fred Farrar	1913-1916

ATTORNEY GENERAL'S OFFICE

Fred Farrar ..... Attorney General
Francis E. Bouck ..... Deputy Attorney General
Frank C. West ..... Assistant Attorney General
Norton Montgomery ..... Assistant Attorney General
Wendell Stephens ..... Assistant Attorney General
Clement F. Crowley ..... Assistant Attorney General
Ralph E. C. Kerwin ..... Assistant Attorney General
Margaret E. Fallon ..... Stenographer
Helen Cuthbertson ..... Stenographer
Pauline Hughes ..... Stenographer

(NOTE—For brief periods the following acted as special assistants: Clarence M. Hawkins, W. B. Morgan, John Horne Chiles.)

INHERITANCE TAX DEPARTMENT

Leslie E. Hubbard ..... Inheritance Tax Appraiser and Assistant Attorney General
Edwin L. McCulloch, Leo U. Guggenheim ..... Deputy Inheritance Tax Appraisers
Edith Mary Stewart ..... Stenographer
Margaret McDermott ..... Clerk

Biennial Report

of the

Attorney General

of the

State of Colorado

His Excellency,

GEORGE A. CARLSON,

Governor of the State of Colorado, Denver.

Sir: Pursuant to law, I submit a report of the work of this department for the period commencing with the first day of December, 1914, and ending with the 30th day of November, 1916.

Inasmuch as the work of this department has been largely a continuation of the work of the preceding biennial period, it would seem unnecessary to make a report of any length. The work has continued to be extraordinarily heavy and while many questions which arose during my first term of office were settled or determined during that biennial period, nevertheless some remained for determination during the biennial period just closed.

During my incumbency in the office of Attorney General the department has been a factor in the determination of many new questions arising out of or connected with the numerous constitutional provisions or statutes making what might properly be termed radical changes in the fundamental principles of our state government. I am pleased to say that many questions which were troublesome when these laws first became effective have now been settled, making for more definite construction and procedure under them. Probably the most interesting, from some viewpoints, was the determination of the question as to whether or not freehold cities operating under Article XX of the Constitution were subject to the state-wide prohibition amendment adopted by the people at the general election in 1914. The question arose by reason of the fact that under the authority given in the Charter of the City and County of Denver, the question of prohibition within the City

and County of Denver was submitted to the voters within the territorial limits of the City and County some time early in the year 1915. The vote was in favor of licensing saloons. Pursuant to the result of this election, the authorities of the City and County of Denver proposed to grant licenses expiring at a date later than the first day of January, 1916, the effective date of the state-wide prohibition amendment. It was agreed between myself and the Honorable James A. Marsh, City Attorney of the City and County of Denver, that an early determination of this question was advisable from every viewpoint. Accordingly, Mr. Marsh joined me in an application to the Supreme Court of the State of Colorado to take original jurisdiction of a case in *certiorari* to determine the right of the authorities of the City and County of Denver in this regard, and a decision was rendered by the Supreme Court in the case of People *ex rel.* George A. Carlson as Governor and Fred Farrar as Attorney General, plaintiffs, vs. Clair J. Pitcher, Commissioner of Finance and *ex-officio* Excise Commissioner of the City and County of Denver, and August Koch, defendants, in which the Supreme Court held that the City and County of Denver was amenable to the provisions of the Constitution concerning prohibition. The decision put at rest those claims which were advanced to the effect that the City and County of Denver, being a charter city, was entitled to determine the question for itself regardless of the action of the State as a whole.

Other decisions of interest to the state might be referred to, but inasmuch as they are rather generally known it would seem unnecessary to revert to them here.

PROSECUTION OF CASES ARISING OUT OF THE COAL MINE STRIKE OF 1913-1914

Pursuant to the direction given by your predecessor, the Honorable Elias M. Ammons, and maintained by yourself, this department continued the prosecution of indictments returned in Las Animas and Huerfano Counties in which various persons were charged with crime arising out of the coal strike in those two counties, and also continued in co-operation with the district attorneys having jurisdiction in the counties of Fremont and Boulder.

Prosecution of these cases was continued to the extent that circumstances and results seemed to justify. The difficulty of obtaining convictions became so great by reason of the dilatory tactics set up by the defense in petitions for change of judge, change of venue and similar things, and so much influence was brought to bear against the continuation of the further prosecution of any of these cases, that it was deemed advisable to dismiss most of them. This was accordingly done. A few of the more serious cases yet remain undismissed, and several, where convictions were obtained, are now pending on writ of error in the Supreme Court of this state.

This department used every effort consistent with the duty of prosecuting officers in the prosecution of these cases, and it is notable that out of all the numerous crimes of violence committed during the strike of the coal miners in the year 1913 to 1914, not one offender is today suffering a penalty for his crime. The difficulty of securing convictions in this class of cases has been such that I am almost compelled to state that the sum and substance of the work of this department in this regard has been to set a precedent which may at some future period in the history of the state enable some other officer or officers to take a stand without equivocation for the enforcement of the law and preservation of the peace in some similar crisis.

INTERSTATE IRRIGATION CASES

The Nineteenth General Assembly made an appropriation of $50,000.00 for the defense of cases wherein attack was made from the outside against the state or its citizens in the matter of the use of the water of our streams for irrigation. The work done during the biennial period of 1913-14 was fully reported in my biennial report for those years. The Twentieth General Assembly very generously renewed that appropriation of $50,000.00 and the defense of these cases has been vigorously maintained.

Probably the most important is the Wyoming-Colorado case, an original suit in the Supreme Court of the United States. This case has been fully argued and submitted and a decision may be expected within the next few months.

The Arkansas Valley suit (United States Irrigation Co. vs. Graham Ditch Co., *et al.*), which has been pending since 1910, and which has cost the State of Colorado alone, the sum of $38,217.97, and the defendants directly affected probably a sum equal to or greater than this amount, was finally settled by an agreement between the various ditch companies in Colorado and the plaintiff. In addition thereto certain other ditches diverting water from the Arkansas River in Kansas entered into the agreement. The settlement required the payment of a certain sum of money by the defendant ditch companies to the State of Colorado, and the case was dismissed. Under the terms of this settlement the plaintiff yielded its claim for its appropriations as of date 1884 and in lieu thereof accepted, as against the defendant companies in Colorado, a date coincident with the commencement of the suit, that is, August 27, 1910. The other Kansas ditches joining in the agreement accepted a similar plan.

Neither the State of Colorado nor any of the officers of the state are parties to this agreement, and the state is left free to contest the question should it ever see fit to do so. However, this settlement, instead of reaching the complete result desired, seems to have encouraged the commencement of another case by other water users in Kansas, for, within the last few weeks, another case has been commenced in the United State District Court for the

District of Colorado wherein the Finney County Water Users' Association has sued the junior Colorado ditches on the Arkansas River in a manner substantially the same as that involved in the settled case, except, however, that in the Finney County case now pending no state officers are made parties defendant. The case, however, is just as vital as the preceding case, and, as a matter of fact, as vital to the state as was the original Kansas-Colorado case decided by the Supreme Court of the State of Colorado in favor of Colorado in 1906.

The Republican River case (The Pioneer Irrigation Co. vs. Field, *et al.*), decided adversely to the interests of Colorado and the Colorado defendants by the United States District Court for the District of Colorado, was appealed by the defendants to the United States Circuit Court of Appeals, where, upon the 20th day of November, 1916, an opinion was rendered affirming the decision of the lower court, but in such language that no definite principle of law is established insofar as the question of interstate water rights is concerned.

Following the decision of the United States District Court in the Republican River case, an action was commenced by the Western Irrigation District of Nebraska against various ditch companies upon the South Platte River in Colorado and the water officials, including the State Engineer, the division engineer and the water commissioners for the South Platte River. This case is not yet at issue, but it is of most vital importance to the State of Colorado and must be vigorously defended.

The frequency with which these cases have arisen within the last few years is noteworthy. The fact that in some of them relief is sought through suits against the individual ditches alone, in others against the individual ditches and the water officials, without joining the State of Colorado directly as a party defendant, permits these cases to be tried in the United States District Court, and in view of the decisions of the United States Circuit Court of Appeals, this complicates the situation beyond that which would be presented if the cases were brought by one state against another. In view of the decisions referred to, and in the absence of definite determination of the question by the Supreme Court of the United States, it is possible that individual appropriators in Colorado may be enjoined from taking water until the alleged needs of the earlier appropriator in the lower state have been supplied, and in this way the state may be indirectly mulcted of its waters without the solemn consideration by the Supreme Court of the United States of a case between sovereign states.

This anomalous situation has given those persons who have followed the trend of events no small concern, and I believe the time has arrived when it is well for the legislative, as well as the executive, authorities of the State of Colorado, to consider the possibility and also the advisability of commencing actions wherein the State of Colorado itself would be the complainant against the

lower states from whose borders these threats arise and also the appropriators in those lower states, to quiet the title of the State of Colorado to its waters. This would bring to a speedy determination the full question of the respective rights of the states as well as of the individuals involved. In my judgment, there is sound legal principle upon which to base such a case, and while the cost would be considerable, it would be much less in the end than the cost of defending a number of cases brought against us in the manner mentioned. I sincerely commend to the members of the Twenty-first General Assembly and to the executive officers of the state the necessity of due consideration of this subject, and in the meantime recommend that the defense of the pending cases be most vigorously maintained.

I beg to report that out of the $50,000.00 appropriated by the Twentieth General Assembly, the following amounts have been expended in the defense of the various cases and also in the investigation of the Rio Grande River, with a view to gathering sufficient data to enable us, at the proper time, to secure a release of the embargo now obtaining by the Federal Government against the construction of ditches and reservoirs to divert water in Colorado from the Rio Grande River:

	1915	1916	Total
Wyoming vs. Colorado	$ 2,972.62	$ 7,765.24	$10,737.86
Arkansas Valley suit	12,744.60	6,462.27	19,206.87
Platte River	100.00	2,569.40	2,669.40
Republican River	1,394.66	1,432.34	2,827.00
Rio Grande River	2,543.82	2,124.32	4,668.14
Totals	$19,755.70	$20,353.57	$40,109.27

INHERITANCE TAX

I wish to commend the able work done by Mr. Leslie E. Hubbard, who is to succeed me as Attorney General, in the performance of his duties as Inheritance Tax Appraiser, and also in the same connection the work of the two Deputy Inheritance Appraisers, Mr. Edwin L. McCulloch and Mr. Leo U. Guggenheim. This department has, during the fiscal years 1915 and 1916, collected the sum of $1,069,463.02, an amount which has not heretofore been approached in the history of this state. Mr. Hubbard's report, covering the biennial period, is appended hereto.

I cannot close without publicly commending the loyal and efficient service rendered to the State of Colorado by the members of my department. These are: Mr. Francis E. Bouck, Deputy Attorney General; Mr. Frank C. West, Mr. Norton Montgomery, Mr. Wendell Stephens, Mr. Clement F. Crowley and Mr. Ralph E. C. Kerwin, Assistant Attorneys General; and Miss Margaret E. Fallon, Miss Helen Cuthbertson, Miss Pauline Hughes, Miss Edith

Mary Stewart and Miss Margaret McDermott, the clerical staff for the main department and the Inheritance Tax department.

Herewith I also submit the opinions rendered by the department during the biennial period just closed insofar as they are of a general or public interest.

Respectfully submitted,

FRED FARRAR,
Attorney General.

Report of

Inheritance Tax Department

Hon. Fred Farrar,
Attorney General,
State of Colorado.

Sir: I hand you herewith report of the Inheritance Tax Department, covering receipts, disbursements, tax assessed and outstanding, and all other work appertaining to the department for the fiscal years 1915-1916.

RECEIPTS AND DISBURSEMENTS

We appraised and collected the tax or waiver fees upon 3,518 estates amounting to $1,069,463.02 at a cost of $24,200.54, a record unparalleled in the department.

COMPARISON OF RECEIPTS

The total collection for years 1902-1912 amounted to $1,139,766.76, and for years 1913-1914 to $465,063.02. The tax collected for 1915-1916 amounts to $1,069,463.02 and is $604,400.00 more than was ever collected in this department for a biennial period, and only $70,303.74 less than total amount collected for eleven years between 1902-1912.

COMPARISON OF EXPENSE

The expense of the department, including salaries of appraiser, deputies, stenographer and clerk and for traveling and hotel, witness fees, postage, stationery, printing, telephone, telegraph and incidentals, amounts to $24,200.54, which is 2.26% of the amount actually collected.

We reduced the cost of collection from 8.09% in 1909-1910, and 5.47% in 1911-1912 and 4.1% in 1913-1914 to 2.26% for 1915-1916.

COMPARISON OF WORK

From 1902 to 1912 the tax was collected and waivers issued on 1,636 estates, for 1913-1914 on 2,096 estates, making a total of 3,732 estates disposed of in thirteen years.

During the present biennial period of 1915-1916 we collected the tax and issued waivers upon 3,518 estates, only 114 less estates than the total disposed of during the 13 years preceding.

UNFINISHED BUSINESS

In addition to the estates disposed of we have 26 estates upon which the taxes assessed amount to $85,325.14 and 200 estates upon which no tax is due but the waiver fees amount to $1,200.00, and 35 estates upon which the tax has been calculated amounting to $21,307.75 but assessment order has not been entered. Seventy estates under process of appraisement in the office should produce taxes estimated at $100,000.00. Thus the total revenue in the department uncollected amounts to approximately $207,833.84.

SYSTEM AND RESULTS

We have conducted the business of the department with courtesy and fairness and established an enviable reputation for efficiency and economy in public affairs.

RECOMMENDATIONS

The Inheritance Tax Law has developed a few inequities and defects which should be corrected. The amendments we submitted to the last legislature were ignored. They should be presented to the incoming legislature with hope of favorable action.

The present method of transferring the inheritance taxes collected to the general fund should be discontinued and the money transferred to a permanent improvement fund or endowment fund for State institutions.

The department needs more help to successfully carry on the business connected therewith and the legislature should make provision therefor. While help might be engaged under the language of the Act, I believe the better method would be an appropriation of a sufficient sum for additional deputies, clerks and stenographers hire.

The record made by the department is the best evidence of our devotion and loyalty to the office and the public service.

Very truly yours,

Leslie E. Hubbard,
Inheritance Tax Appraiser.

APPENDIX

Opinions Rendered During the Second Term of Attorney General Farrar

(January 23, 1915.)

The "Brand Inspection Fund" is not the "Stock Brand Fund" existing prior to 1913, and cannot be transferred to the "Bounty Fund."

Hon. H. E. Mulnix,
Auditor of State,
Denver, Colo.

Dear Sir: You have asked me whether Section 426 of the Revised Statutes of Colorado, 1908, requires the transfer at this time of any money to the Bounty Fund, and you call my attention to Session Laws 1913, page 145, Section 13, as in apparent conflict with that section.

In reply I would say that Section 426 is impliedly repealed by the act found in Session Laws 1913, pages 142-146, inclusive.

The Stock Brand Fund, mentioned in Section 426, consisted of moneys received by the Secretary of State at a time when that officer was charged with the duty of recording stock brands. In the 1913 act this duty was transferred to the State Board of Stock Inspection Commissioners, and the money received for recording stock brands is thereby directed to be paid into the Brand Inspection Fund, which is an old fund existing since 1903 (Session Laws 1903, page 443, Section 26), entirely separate from what is called the Stock Brand Fund in Section 426. (Session Laws 1903, page 432, Section 11, superseded Session Laws 1899, page 357, Section 17, and should be examined in this connection.)

I take it that your question is, therefore, whether any of the moneys in the Brand Inspection Fund are to be transferred to the Bounty Fund, and my answer is in the negative.

Very truly yours,

FRED FARRAR,
Attorney General.

By FRANCIS E. BOUCK,
Deputy.

(February 6, 1915.)

Exemption of church property from taxation.

Mr. W. F. Ulrey,
Monte Vista, Colo.

Dear Sir: Under date of January 25th, you wrote me asking to know whether or not church holdings are exempt from taxation, also whether or not there is any limit to the number of properties or the valuation.

I beg to advise that the Constitution of this state, Article X, Sections 5 and 6, provides:

> "Lots with the buildings thereon, if said buildings are used solely and exclusively for religious worship, for schools or for strictly charitable purposes, also cemeteries not used or held for private or corporate profit, shall be exempt from taxation unless otherwise provided by general law."
>
> "All laws exempting from taxation, property other than that heretofore mentioned shall be void."

By statute, parsonages are exempt. The statute is clearly unconstitutional, but I have not felt that it was my duty to raise the constitutionality of it and it has been the practice to exempt parsonages from taxation.

This, I believe, answers your question. The exemption pertains solely to lots and the buildings thereon used solely and exclusively for religious purposes. You can apply it to the facts as they exist in your case. Generally speaking, lots upon which there is no church building which belong to a church organization or property other than that used solely and exclusively for religious purposes are subject to taxation.

Yours very truly,

FRED FARRAR,
Attorney General.

(February 18, 1915.)

Prerequisites to the admission of a foreign reciprocal or inter-insurance exchange into Colorado.

Mrs. D. M. Rolph,
Commissioner of Insurance,
Denver, Colo.

Dear Madam: I have your letter of February 11th, 1915, wherein you state that the Utilities Indemnity Exchange has made application for admission to this state to operate under Section 81 of the Colorado Insurance Code, and note that you request an opinion as to whether you can admit this company, in view of the fact that the company has no certificate of authority from the Insurance Commissioner of the State of Missouri authorizing it to transact business in this state.

After examining the decision of the Supreme Court of Missouri in the case of State *ex rel.* vs. Revelle, Supt. of Insurance, 257 Mo., 529, and the decision of the Missouri Court of Appeals in the case of Isaac H. Blanchard Co. vs. Homblin, *et al.*, 162 M. A., 242, together with the opinion of Attorney General Barker rendered May 7th, 1914, I find that under the laws of Missouri a

Reciprocal or Inter-Insurance Exchange is permitted to transact business in that state without the necessity of obtaining a certificate of authority from the Insurance Commissioner. Therefore, the only question for you to decide is whether the Utilities Indemnity Exchange has complied with the provisions of Section 81 of the Insurance Code (Session Laws 1913, page 373), and if it has complied therewith, you should issue a certificate of authority as provided for in sub-division f of said Section 81.

Yours very truly,

FRED FARRAR,
Attorney General.

By WENDELL STEPHENS,
Assistant.

(February 23, 1915.)

Exemptions from military poll tax.

Hon. Gordon M. Grimes,
County Assessor,
Pagosa Springs, Colo.

Dear Sir: Replying to your inquiry of the 17th inst., concerning the exemption of forest rangers or men employed in the national forest service from military poll tax:

Section 4350 of the Revised Statutes of 1908, read in conjunction with Sections 4457 and 4458, provides all the exemptions that exist with reference to military service and military poll tax under the laws of Colorado. Forest rangers and forest service employees are not exempted by those sections, and, in my judgment, are not exempt from the payment of military poll tax under the laws of this state.

I trust this answers your communication.

Yours truly,

FRED FARRAR,
Attorney General.

By CLARENCE M. HAWKINS,
Assistant.

(February 25, 1915.)

Method of distributing the expense of the District Attorney's Stenographer among the counties of districts of a certain class.

Mr. George J. Bailey,
County Attorney,
Walden, Colo.

Dear Sir: I have had under consideration the question submitted in your recent letter as to the liability of Jackson County

for a part of the salary of the district attorney's stenographer, under Section 2, Session Laws 1907, page 370.

The section makes all the counties of the district equally liable whether they are all counties of the second class or not, provided there is at least one county of the second class in the district.

Attorney O. E. Collins, of Colorado Springs, the author of the act in question, informs me that his own district (the fourth, which includes El Paso, a county of the second class) has been paying the annual salary of the district attorney's stenographer in compliance with the section above referred to, by the payment each month of one-seventh of the $100.00 by each of the seven counties in the district.

My opinion is, therefore, that the board of county commissioners of Jackson County ought to allow the proper amount each month as above indicated.

Very truly yours,

FRED FARRAR,
Attorney General.

By FRANCIS E. BOUCK,
Deputy.

(March 8, 1915.)

A mutual ditch company is considered to be a corporation not for profit, notwithstanding that it may have been organized with a capital stock divided into shares.

Hon. John E. Ramer,
Secretary of State,
Denver, Colo.

Dear Sir: The Fruit Ridge Ditch Company, as I gather from the papers you have submitted, desires to file articles of incorporation as a corporation not for pecuniary profit.

Its articles provide for a capital stock divided into shares, and you raise the question whether you ought not to collect a filing fee based upon the amount of the capital stock.

If the company is entitled to be considered a corporation not for pecuniary profit, it is expressly exempt from the law of 1901 requiring a fee based on its capitalization. (R. S. 1908, Sec. 901.) The question to be determined, therefore, is whether a corporation not for pecuniary profit loses its standing as such by having a capital stock.

It is well known that for many years there have existed in Colorado what are called mutual ditch companies, which restrict their service to their own members or stockholders. They are granted special constitutional exemption from taxation (Colorado

Constitution, Art. X, Sec. 3). Their purpose is in no sense that of making a profit for those concerned. They frequently, if not invariably, have a capital stock divided into shares. Yet, though they have a capital stock, they do not declare dividends. On the contrary, their expenses are paid by assessments levied on the stock according to the system permitted in the case of ordinary ditch companies. (R. S. 1908, Sec. 991.) Moreover, and this, I think, is a strong reason for holding as I do, the capital stock is used as a convenient measure of the shares to which the stockholders are respectively entitled in the water of the ditch. This method has become so thoroughly fixed and is so convenient and satisfactory, that to require a company to discontinue it would involve a manifest hardship, and I feel that, in view of the long-established custom, the articles ought to be accepted and filed in their present form without requiring the fee to be paid on the basis of stock.

There may be other advantages in having a capital stock without necessarily involving a profit to the stockholder. For instance, it is a convenient basis for the final division of property among the stockholders in case of dissolution or termination of the corporate term.

For the reasons hereinabove set forth, I advise you to file the articles tendered and treat the company in every respect as you would any corporation not for pecuniary profit.

Very truly yours,

FRED FARRAR,
Attorney General.

By FRANCIS E. BOUCK,
Deputy.

(March 17, 1915.)

Governor's veto on eleventh day, when tenth day is Sunday, is valid.

Honorable The House of Representatives,
Twentieth General Assembly,
State of Colorado:

I have this morning received your communication asking whether or not the attempt of the Governor to veto House Bill No. 61 is valid.

The facts as reported to me and as they appear from the records of the House are these: The bill was left with the Governor for his consideration on the 4th day of March, 1915, at the hour of 11:30 A. M. This is shown by the receipt given to the enrolling committee by the secretary of the Governor, Mr. Vivian. The veto message was received by the House on the 15th day of March, eleven days after its receipt.

The Constitution of this state, Article IV, Section 11, which empowers the Governor to veto bills presented to him for his signature and prescribing the procedure in the event that he does veto them, provides also:

> "If any bill shall not be returned by the governor within ten days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the general assembly shall, by their adjournment, prevent its return, in which case it shall be filed with his objections in the office of the secretary of state within thirty days after such adjournment, or else become a law."

In computing the time, that is the ten days, during which the Governor has the power to veto a bill, the date upon which it is received by him is not counted. In the case in discussion, the first day of the ten would be the 5th, and the tenth day would be the 14th, which is Sunday. The journal of the House shows an adjournment from Friday, the 12th, until Monday, the 15th. This, of course, was not an adjournment of the legislature such as is contemplated by the Constitution and which would prevent the Governor from returning the bill to the House, but, on the other hand, the House was not in session on the 14th day of the month, that being the tenth day, ostensibly for the reason that it was Sunday, and under a decision from the Supreme Court of this state, the veto message to the House, received by it on the 15th, is entirely proper and the veto, insofar at least as this point is concerned, is entirely valid.

The authority which I mention is "In the Matter of Senate Resolution of March 31, 1887, requesting a construction of Section 11, Article IV of the constitution in relation to Senate Bill No. 56." 9 Colo., 633.

The facts in that case are practically identical with the present question and the decision is conclusive of the question. I therefore beg to advise you that the Governor's veto message was returned in proper time, and unless questioned in some other respect, the veto is valid. You will understand that I am not raising any question as to its validity in any other respect, but use this language merely because one question alone has been propounded.

I have the honor to be,

Very respectfully,

FRED FARRAR,
Attorney General.

(March 20, 1915.)

Teachers' State diploma under 1909 law.

Hon. Mary C. C. Bradford,
State Capitol,
Denver, Colo.

Dear Mrs. Bradford: I am in receipt of your letter in regard to what kind of a state diploma will be issued to a holder of a temporary non-renewable certificate during the life of such certificate when the holder thereof is able to present satisfactory evidence of twenty-four months' successful experience, and in reply desire to say that at such time a state diploma will be granted for a period of five years, and, at the expiration of that time, the same may be renewed for a like period of five years in the discretion of the State Board of Education, and, at the expiration of this time, the same may be renewed for life. Session Laws 1909, page 371.

Yours very truly,
FRED FARRAR,
Attorney General.

By CLEMENT F. CROWLEY,
Assistant.

(March 20, 1915.)

Party primary nomination of one not a member of the party; validity. No primary nominations valid except those of legal parties, as defined in the law.

Mr. William Cross,
City Clerk,
Glenwood Springs, Colo.

Dear Sir: I have received your letter in relation to the election situation in Glenwood Springs. I gather therefrom that a Republican has been nominated at the primary election on the Democratic ticket and the Independent ticket, and you wish to know whether he can be a candidate on both.

If he has been regularly nominated on the Democratic primary ticket, the successful candidate is entitled to a place as the Democratic candidate on the official ballot. Whether the party organization can assail the candidate as not being a proper representative of the party is a question which is not raised and therefore will not be discussed.

As for the candidacy on the Independent ticket, I do not consider the nomination a legal nomination for the reason that the Independent party is not a political party within the terms of Section 2 of Chapter 4, Session Laws 1910, which is our primary election law. It is not entitled to participate in a primary election until its candidate for governor receive 10% of the total vote cast at the last preceding general election in the state.

It is therefore my opinion that the person in question is not entitled to be considered the Independent candidate for mayor, but that, in the absence of proceedings attacking his standing as a Democrat, he is entitled to appear on the official ballot as a representative of the Democratic party. * * *

Very truly yours,

FRED FARRAR,
Attorney General.

By FRANCIS E. BOUCK,
Deputy.

(March 20, 1915.)

Effect of omitting a municipal election prescribed by law.

Mr. C. E. Marvin,
City Clerk,
Creede, Colo.

Dear Sir: Your letter as to whether the City of Creede can get along without holding a municipal election next April is at hand.

I do not know of any penalty for omitting to call the election, particularly if no candidates are certified. It is true that an elector might, if he chose, institute a mandamus suit to compel the holding of the election, but where the election involves a large expense, and the people are unanimous against incurring that expense, it would seem as if the omission would be excusable.

Your case seems all the stronger from the fact that Creede has fallen below the standard of population for a second-class city, and that, if one of the pending bills of the Twentieth General Assembly becomes a law, as now appears probable, you will become an incorporated town.

Should you decide not to have an election, I would suggest that you take into your official custody the petition re-nominating the present officers, prepared as stated in your letter. If a mandamus proceeding were brought, these persons would then be sure to appear on the ballot as candidates.

Ordinarily we would not advise anyone not to perform statutory duties, and the above is to be taken simply as a statement of what, in my opinion, would be the actual consequence if the election were not held.

Very truly yours,

FRED FARRAR,
Attorney General.

By FRANCIS E. BOUCK,
Deputy.

(March 29, 1915.)

A resolution of the General Assembly is not sufficient authority for paying out public funds in the absence of, or contrary to, existing statutes.

Hon. Charles Dailey,
House of Representatives,
Denver, Colo.

Dear Sir: Pursuant to your question as to whether or not money could be legally borrowed upon the obligation of the state either from the public school fund or any private source upon the authority of House Joint Resolution No. 14, I beg to advise that the resolution does not and cannot have the force and effect of legislation. It is limited to an expression of the desire upon the part of the General Assembly, or the house adopting it, to have some certain thing therein expressed adopted as a rule of procedure by some authority.

In this particular instance your resolution would merely be the expression of the members of the General Assembly of the desirability in their opinion of issuing some obligation which would bind the state to the re-payment of money borrowed upon the faith of the one-half mill levy to be made in the latter part of the year 1915, to be devoted to the building of good roads.

Necessarily, the resolution cannot in any way create or change existing law. If it is legal to anticipate this revenue at this time, it can be, of course, done without resolution. On the other hand, if the law does not permit the executive department to anticipate this revenue, the resolution does not make the procedure legal.

I am,

Yours respectfully,

FRED FARRAR,
Attorney General.

(March 30, 1915.)

Constitutionality of S. B. 229 (1915), proposing to re-enact substantially Section 35 of the Public Utilities Act (S. L. 1913, p. 464), one of the three sections rejected by referendum vote in 1914.

The Honorable The House of Representatives,
Twentieth General Assembly,
Denver, Colo.:

Pursuant to a request from the House, based upon a motion made upon Wednesday, the 24th day of March, 1915, asking my opinion as to the constitutionality of Senate Bill No. 229, the same being "A bill for an act to amend 'An act concerning public utilities, creating a public utilities commission, prescribing its powers and duties, and repealing certain acts and parts of acts in conflict herewith,' approved April 12, 1913," I beg to advise that the question propounded is profound.

The motion does not call attention to any specific constitutional inhibition which might be violated, but goes to the whole phase of the constitutionality of the bill, no matter from what point the attack might be directed.

By informal discussion with several of the members of your body, I have learned that the constitutionality has been questioned mainly along three lines, the first two being that it is in violation of Sections 25 and 35 of Article V, of the Constitution. As I understand them, I do not believe that these two sections are in any way violated by the bill.

The third objection is that the bill is in violation of Article XX as amended, and I assume that it is upon this point that the doubt as to its constitutionality exists. The subject deserves consideration and study much more thorough than I have been able to give it, because of the demands for an early opinion. In some respects, the law in this state is a matter which can be determined only by a decision from a court of last resort, and I must suggest that this opinion recognizes these uncertainties and I express the hope that your Honorable Body will realize that my view of this law is in no wise conclusive.

The bill is substantially a re-enactment of Section 35 of the Public Utilities Act of 1913. Sections 35, 36 and 37 of that act were referred to the people and defeated. The only substantial difference between the pending bill and Section 35 is that Section 35 applied to or included within its terms street railway corporations, gas corporations, electric corporations, telephone corporations, telegraph corporations, water corporations or persons seeking to construct a street railroad line, plant or system or the extension of such, whereas the pending bill includes all public utilities except steam railroads. It immediately raises the question as to what are included within the term "public utilities" and we are naturally led back to the definition of such in the Public Utility Act of 1913. Section 3 thereof defines the term "public utility" when used in the act to include every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, person or municipality operating for the purpose of supplying the public for domestic, mechanical or public uses, and every corporation or person now or hereafter declared by law to be affected with a public interest. It therefore follows that the present bill is designed to affect municipal corporations supplying the public for domestic, mechanical or public use.

The bill provides, with certain exceptions, that no public utility shall build or extend its facility, plant or system without the consent of the Public Utility Commission, and that such consent shall not be given until the proper franchise or permit shall be obtained from the proper authority, and the question resolves itself into this: Can the legislature delegate to the Public Utilities Commission the power to refuse a permit to a municipal corporation or to any other person, association or corporation seeking to build or enlarge a public utility plant?

The authorities seem to be practically uniform that the power to control public utilities is a police power and within the sovereign jurisdiction of the state except as the same may be forbidden by either the federal or the state constitutions. It is also recognized that this power may be delegated, and in Colorado it has been delegated by a general statute, Section 6525, Revised Statutes 1908, more particularly by Sub-divisions 68 and 69. You will understand when I use the expression in this immediate connection that this power has been delegated, I am speaking only in a general sense, intending to state thereby that inasmuch as the power therein delegated is purely legislative, that it may be withdrawn by legislative enactment and the power exercised by the state. There is one possible exception to this, and even that exception is in doubt under the decisions affecting the question from various states and that is as to whether or not the control of the state could be so resumed as to interfere with contracts entered into by the municipalities pursuant to the section mentioned. It is not necessary to pursue that inquiry in this opinion, for the reason that it does not go to the constitutionality of the law but to its application, and, in my judgment, regardless of the ultimate conclusion upon that specific point, the power of control within the state could, in any event, be exercised over any public utility, including municipal corporations as defined above, in all matters arising *in futuro* unless, perhaps, they are already covered by legal contract.

However, towns and cities in this state are divided generally into two classes, those operating pursuant to Article XX of the Constitution as amended, commonly known as the home rule amendment, and those incorporated under the general law of the state, and the delegation of authority above referred to, conferred by Section 6525, Revised Statutes 1908, refers to towns and cities operating under the general statutes. We now come to the question of the charter cities, by that I mean towns or cities operating under Article XX. This article was amended by the vote of the people at the general election on November 4, 1902. It referred specifically to the City of Denver and generally to any other cities of the first or second class which saw fit to include themselves within its provisions. It confers upon the City and County of Denver, among other things, the power "within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct and operate, water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof."

The bill under discussion does not, in any way, affect the question of the control or management of rates or service, and those questions are expressly eliminated from the intent and purpose of this opinion. The bill, therefore, insofar as the point under discussion is concerned, insofar as it relates to the City and County

of Denver, will have to yield to the constitutional provisions above quoted, contained in Article XX, insofar as the same refer to the City and County of Denver unless it should be held that the provisions which are so clearly therein expressed, must yield to the general law of the state passed for the purpose of the exercise of the police power of the state. Arguments can be made that such might be the rule; in other words, there is a theory upon which the courts might hold that even the constitutional provision above referred to is subject to the paramount rule that the exercise of the police power remains in the state and cannot be irrevocably delegated. It is my judgment that such will not be the rule, and I am of the opinion that the bill under consideration will have to yield to the constitutional provisions giving Denver the powers above set forth.

In 1912 the people adopted an amendment to Article XX of the Constitution, amending Section 6 thereof, whereby all towns and cities with a population of two thousand or more might adopt charters, giving them full authority over local matters in their local self-government. Unfortunately the wording of the amendment to Section 6, that is, the 1912 amendment, is not as clear as we might desire, but it was obviously the intention to give to those towns and cities like powers, insofar as they are applicable, to the powers given to the City and County of Denver. The amendment specifies certain things which are expressly conferred, and concludes:

> "It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny to such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right."

It will readily be seen that we are decidedly within the shadow zone in discussing the effect of the bill as to these charter towns and cities, because of powers less definitely stated than in the case of Denver, and it will require some authoritative decision before the doubt can be entirely removed. If the bill, when enacted, must yield to the provisions affecting the City and County of Denver, it will then probably also yield to the provisions of Article XX insofar as it affects other charter cities.

I do not think it wise to burden an already long opinion with authorities for my conclusions. I trust you will recognize that we are delving into very abstruse questions of constitutional law and there is such a change in the trend of recent decisions based upon legislation creating boards with power to control and regulate public utilities that laws which a few years ago would have been, without hesitation, declared unconstitutional, are now being sustained.

My conclusion is that the bill in question is constitutional insofar as the criticisms herein referred to are concerned, but that, in the application of the law, should the bill be enacted, the City and County of Denver will have to be exempt and that probably all other cities operating under charters pursuant to Article XX will also have to be exempt; in other words, it is a question more of application than an abstract question of the constitutionality of the bill itself.

I remain,

Yours very respectfully,

FRED FARRAR,
Attorney General.

(March 31, 1915.)

Fees collectible in connection with issuance of commission merchant's license.

Meaning of the expression "fair tables of * * * fees."

Honorable John E. Ramer,
Secretary of State,
Denver, Colo.

Dear Sir: I am in receipt of your inquiry of March 30, relative to Senate Bill No. 288, being "An Act defining a Commission Merchant," etc., approved March 24, 1915.

In my opinion the ten dollar license fee required by Section 3 of the act is all that you can collect from the applicant. No fee is provided for the filing of the application or of the bond. An officer can collect a fee only when express provision is made therefor.

Section 2545, R. S. 1908, to which you refer, does not confer the power of collecting other fees than those for which provision is elsewhere expressly made. This section requires officers of the state to "make fair tables of their respective fees," it is true, but the adjective "fair," in my judgment, does not apply to "fees," but to "tables," and is used in the sense of "distinct" or "legible." It has no reference to the reasonableness of the fee.

Very truly yours,

FRED FARRAR,
Attorney General.

By FRANCIS E. BOUCK,
Deputy.

(April 2, 1915.)

Qualifications of voters as prescribed by 1903 law.

Oath to be administered to challenged voters must be changed accordingly from the form given in the old law.

Mr. F. A. Hensley,
Hudson, Colo.

Dear Sir: You have asked me to state the qualifications necessary for a voter who offers to vote at the ensuing municipal election in Hudson, which is an incorporated town.

I beg to say that under the law, as enacted in 1903 (Session Laws 1903, page 214), a voter must possess the following qualifications:

1. He shall be a citizen of the United States;

2. He shall have resided in Colorado one year immediately preceding the election at which he offers to vote; in the county 90 days; in the city or town 30 days, and in the ward or precinct 10 days.

In this connection, I wish to call attention to the fact that when a voter is challenged at an election the challenge necessarily must have reference to the law as amended by the above statute. The questions put to the challenged voter by the judges and the oath to be administered to the voter when he swears in his vote, must mention the qualifications as above stated, and not as found in the former law as stated in Revised Statutes of Colorado, 1908, Sections 2253, 2254, *et seq.*

Very truly yours,
FRED FARRAR,
Attorney General.

By FRANCIS E. BOUCK,
Deputy.

(April 24, 1915.)

A life insurance company's One Year Term Policy renewable at the company's option, must contain the incontestible clause.

Mrs. D. M. Rolph,
Insurance Commissioner,
Denver, Colo.

Dear Madam: I have your letter of April 17th, wherein you call attention to the fact that The Aetna Life Insurance Company is issuing, from its accident and liability department, a One-Year Term Life Certificate, renewable at the option of the company, which does not contain the incontestible clause as required by Subdivision 2 of Section 43 of the 1913 Insurance Code (Session Laws 1913, page 350).

Section 43 is as follows:

> "On and after the passage of this act, it shall be unlawful for any foreign or domestic life insurance company to issue or deliver, in this state, *any* life insurance policy unless the same shall contain the following provisions:"

The section then contains nine sub-divisions, setting forth the provisions which all life insurance policies shall contain. Subdivision 2 thereof is as follows:

> "A provision that the policy shall constitute the entire contract between the parties and shall be incontestible after not more than two years from its date, except for non-payment of premiums and except for violation of the conditions of the policy relating to naval and military service in time of war, or other prohibited risk."

The legislature has required that all the provisions set forth therein shall be incorporated in all life insurance policies without any exceptions other than the one contained at the end of Subdivision 9 in regard to the payment of premiums. The exception therein set forth is as follows:

> "In all the foregoing provisions or portions thereof relating to premiums, not applicable to single premium policies, shall, to that extent, not be incorporated therein."

When the legislature requires certain general provisions to be incorporated in all life insurance policies and only excepts the provisions relating to premiums in the case of single premium policies, it is perfectly clear therefrom that it was the intention of the legislature that One-Year Term Policies should contain all of the general provisions contained in said section except the one specifically exempted therefrom.

I note that, by a letter from the company, addressed to you, bearing date of March 24, 1915, it is contended that the one-year term feature is carefully maintained and that the company does not issue renewal receipts as such, but that the receipt which is given for the premium in subsequent years provides that it has the effect of re-issuing the One-Year Term Contract. The contents of the receipt for the premium in subsequent years is immaterial for the reason that the fact still remains that it is a renewal of the original contract in that the company collects the same premium regardless of the increase of the rate due to the increasing age of the insured, and also that the renewal or re-issue is based on the statements and representations made by the insured in the original application.

For the reasons hereinbefore set forth, I am of the opinion that you should require all companies to incorporate in their One-

Year Term Policies the incontestible clause as required by said Section 43.

Yours very truly,
FRED FARRAR,
Attorney General.
By WENDELL STEPHENS,
Assistant.

(April 24, 1915.)

No exemption from military poll tax because of honorable discharge from the National Guard; nor because of passing beyond maximum age limit fixed for service.

Mr. B. C. Joy,
Care Office of U. S. Surveyor General,
Denver, Colo.

Dear Sir: In reply to your recent letter I beg to advise that under our law there is no exemption from the military poll tax in favor of one who has been honorably discharged from the National Guard of the state after five years' service therein. Nor is there any maximum age limit by which persons over any particular age are exempt from that tax.

I beg to refer you to Sections 4457 and 4458 of the Revised Statutes of Colorado, 1908.

Very truly yours,
FRED FARRAR,
Attorney General.
By FRANCIS E. BOUCK,
Deputy.

(April 24, 1915.)

Owing to the narrow scope of the title of the 1891 act providing for municipal garnishment, the amendment (S. L. 1911, p. 445), attempting to extend the liability to counties and school districts, is considered invalid.

Mr. John Mugfur,
Justice of the Peace,
Aspen, Colo.

Dear Sir: I have had under consideration your recent letter regarding the garnishment of a county.

There is no doubt that unless expressly so provided by statute, counties, school districts and municipal corporations are not subject to garnishment in Colorado. Under some of the earlier statutes municipal corporations were expressly subjected to garnishment in courts of record of this state, but not before justices of the peace.

In 1891 an act was passed entitled, "An Act for the garnishment of municipal corporations," which provided:

> "That all municipal corporations shall be subject to garnishment upon writs of attachment and execution in the same manner that private corporations and persons are now or may hereafter be subject to garnishment under such writs." (Session Laws 1891, page 234.)

It will be noticed that this act is not an amendment of the Code of Civil Procedure, as has been contended. Nor is its application limited to courts of record. In fact, it appeared in 3 Mills' Ann. Stat., page 746, as Section 2707a in the chapter on Justices and Constables. This law was held not to apply to a county, but only to municipal corporations in the true sense (Stermer v. La Plata County, 5 Colo. App., 382, 383). And on grounds of public policy it was further held, in spite of the 1891 statute, that there could be no garnishment of the salary of a public officer (Troy L. & M. Co. v. Denver, 11 Colo. App., 369).

In 1911 the legislature attempted (Session Laws 1911, page 445) to amend the act of 1891 to read as follows:

> "That all counties, school districts and municipal corporations shall be subject to garnishment upon writs of attachment and execution in the same manner that private corporations and persons are now, or may hereafter be, subject to garnishment under such writs."

In view of Section 21 of Article V of the State Constitution, it seems certain that the legislative attempt to amend the 1891 act cannot be given any effect in so far as it endeavors to extend the garnishment right beyond municipal corporations, for the reason that the subject of the original act was limited to "municipal corporations" and was so expressed in its title. A mere amendment of an act must come within the same limits as the act itself. The amendment here seeks to affect not only municipal corporations, to which alone the title and body of the original act referred, but it purports to cover quasi municipal corporations like counties and school districts as well. This, in my opinion, cannot be allowed, and I therefore give it as my opinion that a garnishment cannot be sustained against the county.

Whether Section 2 of the 1911 act is valid for the purpose of enabling plaintiffs to issue garnishment proceedings against municipal corporations proper in respect to the salaries of their public officers, is a question which is not, of course, raised in your letter. I may say that for reasons similar to those above given on the main question, I consider Section 2 also of doubtful validity, with the chances largely in favor of its being wholly invalid.

Trusting that the delay in answering your letter has not seriously inconvenienced you, I am,

Very truly,

FRED FARRAR,
Attorney General.

By FRANCIS E. BOUCK,
Deputy.

(June 19, 1915.)

Legality of allotment by State Highway Commission to a county in anticipation of revenues.

Hon. T. J. Ehrhart,
State Highway Commission,
Denver, Colorado.

Dear Sir: You have asked my opinion of the legality of the allotment made to Fremont County by the following resolution:

WHEREAS, The State Highway Commissioner and the Advisory Board are required to apportion the State Road Fund among the different counties of the State; and,

WHEREAS, A serious emergency has arisen in regard to the construction of State Highway No. 22, for the completion of which a considerable amount of money is immediately required, and Fremont County now has no funds available for the purpose, either in the County Road Fund of Fremont County, or the State Road Fund; and,

WHEREAS, It is considered of the greatest importance by the State Highway Commissioner and the Advisory Board that assurances should be given and allotment made to the said county to secure the necessary money for completing the work on the said highway, for the reason that unless such funds are provided, a large number of convicts now employed on the work will have to be returned to the State Penitentiary, and the very large amount already expended on the construction of the said highway will be of practically no use to the people of the State until said road is completed, and the stoppage of the work at this time will involve largely increased expense in completing it at a later time;

WHEREAS, Moneys are now provided for and will be available in the State Road Fund not later than March 15, 1916;

NOW, THEREFORE, Be it

RESOLVED, That the sum of Twenty Thousand Dollars ($20,000), or so much thereof as may be necessary for completing the said highway between Parkdale and Cotopaxi, be apportioned to Fremont County for use in the construction and completion of the said highway between Parkdale and Cotopaxi.

The said sum to be payable out of any moneys in the State Road Fund, after the allotments heretofore made shall all be paid, and to be considered as forming a part of the Twenty-five per centum (25%) of the State Road Fund, referred to in Section 8 of the Highway Commission Act, approved March 17, 1913.

Provided, however, that the funds so apportioned shall be expended under the direct supervision and direction of the State Highway Commissioner and his Engineer.

My answer is that such allotment is legal provided there are sufficient revenues now in sight and certainly available to the credit of this biennial fiscal period, aside from any moneys expected to arise from the half mill tax to be levied next fall and aside from what is needed for prior allotments.

Very truly yours,

FRED FARRAR,
Attorney General.

By FRANCIS E. BOUCK,
Deputy.

(June 22, 1915.)

When county offices to be kept open; Saturday half-holidays; business hours.

Mr. W. K. Hanson,
County Treasurer,
Aspen, Colorado.

Dear Sir: You ask my opinion as to whether it would be legal for a county of division B of the fourth class to close its county offices at noon on Saturdays.

Section 2941 of the Revised Statutes of Colorado, 1908, establishes a half holiday on Saturdays within cities of a population of one hundred thousand or more. This, of course, does not apply to your case.

Section 2556, Revised Statutes, 1908, provides that "All county offices, except the superintendent of schools, county assessor and county surveyor, shall keep open at least eight hours every working day. * * *" However, this provision is a part of the statute found in Session Laws 1891, page 307, and appears in an act, the title of which is:

> "An Act to provide for the payment of salaries to certain officers, to provide for the disposition of certain fees and to repeal all acts inconsistent therewith."

Hence there is a serious question whether this provision is valid. According to the decisions of our courts, it is more than

likely that it would be considered of no effect, for the reason that it does not fall within the general subject of compensation of county officers, and therefore violates the provisions of the constitution of Colorado, Article V, Section 21.

Section 1352, Revised Statutes, 1908 (which, as to the point here involved, is not changed by the amendment found in S. L. 1913, page 227), reads as follows:

> "Every sheriff, county clerk, county treasurer and clerks of the district and county courts shall keep their respective offices at the county seat of the county * * *, and they shall each keep the same open during the usual business hours of each day, Sundays and holidays excepted. * * *"

Under this last quoted section, it would be a question as to what constitutes the usual business hours of each day in the case of a county of your class, and this office is hardly in a position to advise you that you are justified in closing your county offices on Saturday afternoon, which would necessarily mean that the usual business hours on Saturday expire at noon.

I may say there are counties in this state which make it a practice of closing the various county offices at noon on Saturdays throughout the months of June, July and August. I have heard of no case where an attempt was made to compel the officers to keep their offices open on Saturday afternoons. The real test would doubtless come in the case of an officer like the county clerk and recorder. It is conceivable that some person would want to file for record a document on Saturday afternoon when such record would be absolutely necessary to preserve rights as against third persons. I have not heard of any such test being made, and, of course, it is possible that a court would hold that no recovery could be had under such circumstances.

Doubtless the business customs of the county involved would be an important item in disposing of the whole question, but, under the circumstances, I feel what I have said above is all that I can say, and I cannot assume any such responsibility as would be involved in giving you specific advice on the question.

Very truly yours,

FRED FARRAR,
Attorney General.
By FRANCIS E. BOUCK,
Deputy.

(June 30, 1915.)

Interest payable on redemption from tax sales.

Anna E. Adkisson,
County Treasurer,
Burlington, Colo.

Dear Madam: Replying to your letter of June 28, in which you ask: "What is the legal rate of computing interest on redemp-

tions of tax sales for the years 1890, 1891, 1892 and 1893," will say:

It appears that all the sales mentioned by you, insofar as the rate of interest is concerned, are controlled by Sections 3864, 3886, 3888, 3905, 3906 and 3912, all in Volume 2 of Mills' Annotated Statutes, edition of 1891. There seems to have been no change made in the statutes as set out in said edition and at said places early enough to affect a sale made in the years mentioned by you.

By Section 3864 it is provided that taxes for the preceding year shall become delinquent on the first day of March and shall draw interest at the rate of 25% per annum.

By Section 3886 it is provided that a penalty of 10% upon the amount of all taxes due upon lands advertised shall be added by the treasurer immediately after advertising real estate for sale and shall be collected by him in all cases.

By Section 3888 a method of bidding off for the county the lands, etc., is provided, and such bid is to be for the amount of such taxes, interest and costs. The same section provides also for the issuance of a certificate and the assignment thereof upon deposit with the treasurer of the total amount due upon such certificate and unpaid and the interest thereon (at 25% per annum), from the date of such certificate; and, likewise, for the payment by such assignee of subsequent taxes and interest.

By Section 3905 it is provided that real property sold under the provisions of the act may be redeemed by the payment to the treasurer, to be held subject to the order of purchaser, of the amount for which such land was sold with interest thereon at the rate of 25% per annum from the date of sale; and 15% on the same if redeemed within three months from the date of sale thereof; and 25% if redeemed after three months and within one year from date of sale; and 40% if redeemed after one year and within two years from date of sale; and 50% if redeemed after two years and within three years, together with the amount of all taxes accruing on such real estate after the first sale, paid by the purchaser and endorsed on his certificate, with interest on the same at the rate of 25% per annum on such taxes paid subsequent to such sale. Subsequent taxes paid before the time when unpaid taxes levied for that year would become delinquent, shall bear interest from time of delinquency.

By Section 3906 is provided an opportunity for the redemption of lands of minors, idiots and insane persons sold for taxes; and by Section 3912 is fixed the amount to be paid in the event of such redemption.

We believe that these sections cover the question submitted by you, and that therefrom you will have no difficulty in making the actual necessary computations in the matter.

Yours very truly,
FRED FARRAR,
Attorney General.
By CLARENCE M. HAWKINS,
Assistant.

(July 2, 1915.)

The salaries of superintendent and assistant superintendent of the free employment bureau are covered by a continuing appropriation in Sec. 2466, R. S. Colo., 1908.

The salaries of chief inspector of boilers and his three deputies are covered by a continuing appropriation in Sec. 6309, R. S. Colo., 1908, as amended by S. L. 1911, p. 213.

Hon. H. E. Mulnix,
State Auditor,
Denver, Colo.

Dear Sir: I have your letter of July 1st wherein you state that vouchers have been presented to you for the payment of the salary for the superintendent of Employment Bureau No. 2, for the month of June, and that the long appropriation bill only includes the salary for this department up to the 31st day of May, 1915; also that vouchers have been presented for the payment of salaries for the chief inspector of boilers for this state and various employes of that department for the month of June, and note that you further state that this department has been suspended by the governor, but that the officers have filled their positions during the month, and note that you request an opinion as to whether, under these circumstances, you would be justified in issuing warrants on the treasurer for these salaries for the month of June.

The legislature has, by Section 2465, R. S. 1908, created free employment offices in this state, and by Section 2466, R. S. 1908, has created the office of superintendent and assistant superintendent and provided therein for their salaries. In view of the fact that the legislature has made the appointment of superintendent and assistant superintendent definite and provided a salary of a certain amount for a definite period, to-wit, $1,200 per annum for superintendent and $1,000 per annum for assistant, I am of the opinion that this constitutes a continuing appropriation and therefore it is your duty to issue a warrant on the state treasurer on proper vouchers presented to you, regardless of the fact that the long appropriation bill contains no appropriation therefor.

In regard to the chief inspector of boilers and the various employes of that department, Section 1 of the act of 1911 (Session Laws 1911, page 213) makes the appointment of the inspector and three deputies definite and also provides for a salary of a certain amount for a definite period, to-wit, $2,500 per annum for the chief inspector and $1,800 per annum for each deputy inspector. Therefore I am of the opinion that said Section 1 of the act of 1911 constitutes a continuing appropriation for the salary of the chief inspector and the three deputies, but that the salary of the clerk employed by the chief inspector is not a continuing appropriation, for the reason that both the employment and the compensation of the clerk are left to the discretion of the chief inspector and are not certain and definite in any respect.

I believe your information that the boiler inspector's office has been suspended by the governor is erroneous. I am advised by the governor's secretary that no attempt has been made to suspend the department, therefore any question arising in that regard is eliminated.

The conclusions herein announced are based upon decisions of our Supreme Court, the last expression of that court being the opinion in the case of Leddy vs. Cornell, 52 Colo., 190. In an earlier case, People *ex rel.* vs Goodykoontz, 22 Colo., 507, the court held that, under the statute then existing, the salary of steam boiler inspectors was fixed and the statute constituted a continuing appropriation. The court comments upon the fact that under that statute these officers were "payable as other state officers," and a reading of that case alone might indicate that the court was of the opinion that those words were the determining factor on the question as to whether or not there was a continuing appropriation. Since the date of that decision, the legislature has amended this law in certain particulars, and, in the re-enactment, the salaries, although fixed, are not declared to be "payable as other state officers." However, in view of the later expression in the Leddy-Cornell case, it is my judgment that the statute, as it now stands, constitutes a continuing appropriation for the inspector and deputy inspectors of steam boilers.

Yours very truly,

FRED FARRAR,
Attorney General.

(July 12, 1915.)

Neither domestic nor foreign inter-insurance organizations can transact a workmen's compensation business.

Hon. E. R. Harper,
Commissioner of Insurance,
Denver, Colorado.

Dear Sir: I have your letter of July 9, wherein you request an opinion as to whether a domestic or foreign organization authorized to exchange Reciprocal or Interinsurance contracts may be authorized to transact a compensation insurance business in this State.

Section 81 of the Insurance Code (Session Laws 1913, page 373) defines and regulates the business of Interinsurance. Subdivision (a) of said section is as follows:

> "Individuals, partnerships and corporations of this State, hereby designated Subscribers, are hereby authorized to exchange Reciprocal or Interinsurance contracts with each other, or with individuals, partnerships and corporations of other states and counties, providing indemnity among themselves from any loss which may be insured against under other provisions of the laws, excepting life insurance."

Subdivision 6 of said Section 81 would indicate that the legislature by implication authorized the transacting of a compensation insurance business by such organizations, but in 1915 the legislature enacted a comprehensive Workmen's Compensation Law consisting of three separate and distinct acts,—one defining the relations between employer and employe and creating an Industrial Commission, one creating a State Compensation Fund, and the third authorizing the organization of Mutual Insurance Companies with power to write compensation insurance.

Section 18 of the Mutual Insurance Company Act is as follows:

> "No mutual insurance company organized under the laws of this state shall insure liability under any workmen's compensation law of this state unless such company be organized under this act and such liability shall be insured by corporations only."

The above section, by necessary implication, takes from domestic Interinsurance organizations any authority which they may have acquired under Section 81 of the 1913 Insurance Code to transact a compensation insurance business.

The legislature has clearly, by the three acts enacted in 1915, confined the business of compensation insurance to incorporated joint stock companies, state insurance and domestic mutual companies organized in the manner prescribed in the act of 1915. As Interinsurance organizations are not joint stock companies and are mutual companies, but not organized in the manner prescribed in the act of 1915, it follows that domestic interinsurance organizations cannot transact a compensation insurance business in this State.

As to foreign organizations: The following portion of Section 917 of the Revised Statutes, 1908, with regard to foreign corporations admitted to do business in this State is applicable:

> " . . . and that such corporation shall be subject to all the liabilities, restrictions and duties which are or may be imposed on such corporations of like character organized under the general laws of this State, and shall have no other or greater powers."

Although interinsurance organizations are not corporations, nevertheless, the policy adopted by the legislature in the above section is clearly applicable to foreign organizations as well as to foreign corporations.

Regardless of the applicability of the above section, you would not be justified in authorizing the doing indirectly of that which the law prohibits being done directly. Since domestic interinsurance organizations are prohibited from transacting a compensation

insurance business in this State, it necessarily follows that the same prohibition applies to foreign interinsurance organizations.

Very truly yours,

FRED FARRAR,
Attorney General.

By WENDELL STEPHENS,
Assistant.

(July 16, 1915.)

"An Act relating to Intoxicating Liquors" (S. L. 1915, p. 275) is not subject to the referendum power.

(Note: The views expressed in this opinion were sustained by the Supreme Court in People ex. rel. Kiefer et al. v. Ramer, 61 Colo. 422, 158 Pac. 146.)

Hon. John E. Ramer,
Secretary of State,
Denver, Colorado.

Dear Sir: In answer to your letter in which you state that a petition has been offered to you to be filed, seeking to refer to a vote of the people an act passed by the 20th General Assembly, known as Senate Bill No. 80, entitled "An Act Relating to Intoxicating Liquors," and asking for advice as to your conduct with reference to receiving this petition, I beg to say that the act in question was approved by the Governor on March 3, 1915, and it contains a paragraph which reads as follows:

> "Section 31. The General Assembly hereby finds, determines, and declares that this act and each and every sentence, phrase, clause, section and sub-section thereof, is necessary for the immediate preservation of the public peace, health and safety."

It is not necessary to review the history of this legislation. Suffice it to say that, at the general election of 1914, a constitutional amendment was adopted by the people of this state, providing for state-wide prohibition, commencing with the first day of January, 1916. This act is legislation supplemental to, or, I might say, in aid of the constitutional amendment previously adopted by the people of the state, and, in the main, provides penalties for the violation of the law which is fundamentally provided by the constitutional amendment.

As I have stated, the constitutional amendment does not prohibit the sale of liquor in this state until January 1, 1916, and the act in question, in similar manner, provides penalties for the violation of the law after January 1, 1916.

There was no emergency clause adopted with reference to this act, and, as I understand the contention made by the proponents of the referendum petition to which you refer, it is, that, inasmuch as there is no emergency-clause, and, furthermore, as the provisions

of the prohibition law do not become effective until January 1, 1916, therefore the clause which I have quoted, popularly known as the "safety clause," is inconsistent with the rest of the act, and, on that account and possibly for other reasons, the bill may be referred under the constitutional amendment providing for the initiative and referendum.

I beg to advise you that, as a general rule, an executive officer has no right to question the constitutionality of an act. There are exceptions to this rule, which need not be noted because they do not prevail in this case. Your duties, insofar as this immediate matter is concerned, are ministerial and you therefore have no right to inquire into or question the constitutionality of this act or any part of it.

As I understand from conversations with you, no protest has been filed going to the question of the validity of the signatures on the petition offered to you; that a protest has been filed against your receiving and filing the petition, but that protest is based upon the grounds that the act is not susceptible to referendum, and that therefore you should not receive and file the petition. Therefore, if the absence of the emergency clause, or, if the date upon which the bill becomes operative as a law, renders it capable of being referred to the people, it is my opinion that these are matters for judicial determination and that you have no duty to perform in that regard.

It is my opinion that the law of this state has been determined by the vote of the people in adopting the constitutional amendment; that it was the duty of the legislature to adopt such legislation as might be necessary to make that constitutional amendment effective, if it was not self-executing; that the legislature has seen fit to adopt the act under discussion, and that this act is now the existing law of this state. The fact that a leeway of a certain length of time, that is, until January 1, 1916, is given before the penalties of the act become effective, is an incident and does not go to the fundamental question as to what is the law of the state.

As to whether or not the legislature has a right to prevent the referendum by adopting the so-called safety clause, I beg to quote from an opinion of the Supreme Court of Colorado. *In re* Senate Resolution, 54 Colo., 270:

> "The next question is, can the general assembly lawfully prevent the proposed act from being referred by the declaration contained in section 6 thereof? To answer this, reference must again be had to the constitutional provision under consideration. It provides that the power reserved designated the 'referendum,' 'may be ordered, except as to laws necessary for the immediate preservation of the public peace, health or safety.' Whether a law is of this character, is for the general assembly to determine, and when it so determines, by a declaration to that effect in the body of a proposed act, we are of the opinion that such declaration is conclusive upon all departments of government, and all parties, insofar as it abridges

the right to invoke the referendum. Such a declaration is a part of the act, and may be passed by the majority required to pass any act, and is in no sense an emergency clause, as contemplated by article V, section 19."

Should a different rule be ultimately adopted relative to this question, is, I believe, a matter to be determined either by proper legislation or by the courts, and it seems to me, in view of the language of this decision, that you are without right to receive the petition tendered to you. It is my opinion, therefore, that you should decline to receive it and should so notify the proponents of the petition.

Yours very truly,

FRED FARRAR,
Attorney General.

(August 16, 1915.)

Workmen's Compensation Law (S. L. 1915, p. 515).

A wife may become entitled to be classed as an employee of her husband.

Counties and other taxing districts must comply with the act.

Status of State institutions, like the University and State Agricultural College, under the act.

To the Honorable, The Industrial Commission of Colorado,
Denver, Colorado.

Gentlemen: A number of questions concerning the Workmen's Compensation Act have been by you submitted to me for suggestion and opinion and have been considered at length.

The act concerning which you seek information, covering as it does ground which is entirely new in this state and practically new in the United States, of course presents numbers of angles which must be thoroughly considered and likewise seeming conflicts between its various provisions which must be eliminated, if possible. Therefore, any question submitted under this act must be approached from all sides and opinions reached are, in the absence of precedents, in the main but advisory.

The questions submitted by you are as follows:

1. "In case a man hires his wife to work in his place of business, can she be classed as an employe? Can a man hire his wife to work for him in this state?"

To these questions I answer that a wife hired to work in the husband's place of business can be, under the Workmen's Compensation Act, classed as an employe and whether or not she is an employe, is, in my judgment, a question of fact. A man can hire his wife to work for him in this state.

2. "Under Senate Bill No. 99, being the Workmen's Compensation Act, can a county or other taxing district decline to come under the act at all, or are all such taxing districts necessarily un-

der the Compensation Act?'' To this inquiry my answer is that no county or other taxing district can decline to come under the act and that all taxing districts are necessarily under the Compensation Act and governed and controlled by its terms and conditions.

3. You ask whether or not the president of a corporation who is a stockholder and director therein and who also has a contract as president of the corporation and receives a salary as such, is an employe of the corporation within the meaning of the Compensation Act.

This question, though submitted to me, has been verbally withdrawn and I understand you do not now desire an answer thereto as you have found authority which is satisfactory to you and upon which you have determined the matter.

4. Your next inquiry is as to whether or not the State University at Boulder and the Agricultural College at Fort Collins are employers within the meaning of Section 4 of Subdivision 2 of the Workmen's Compensation Act.

These and similar state institutions I believe to be so much a part of the administration of the state government and so limited by the Constitution and statutes as to powers and duties, obligations and liabilities which each has, that in the absence of additional legislation they should be construed to be and considered as a part of the state and should not be considered a separate and distinct classification of employers. And, further, that the employes of such institutions should be considered as coming under the pay-roll of the state.

5. You say that under Section 90 of S. B. No. 99, there is provided an appropriation of $20,000 for the purpose of carrying out the provisions of the act. You desire to know if after the premium is paid by the state out of such fund, in case a surplus remains, can the commission use the surplus in carrying the expenses of the insurance department.

As a matter of fact, I understand that after the premiums provided to be paid by the state are paid, there will be no surplus. Inasmuch as there is some doubt as to the use of the money carried by this appropriation, aside from the payment of premiums, I will not attempt to answer the question now. Should there prove to be a surplus later, we can then decide the matter.

I believe the foregoing answers your inquiries insofar as you seek immediate reply to questions submitted.

Respectfully,

FRED FARRAR,
Attorney General.

(September 3, 1915.)

Power of a school board to withdraw from a county high school district.

F. J. Coyle, Secretary,
Silt Union High School Dist.,
Silt, Colorado.

Dear Sir: I have your inquiry of August 18 submitting the question as to whether or not the Silt Union High School District, by the vote and consent of School District No. 4, being a district forming a portion of Garfield County High School District, can receive the maintenance revenue received from taxation in District No. 4 while the portion of their taxes set aside for bonded indebtedness goes to the County High School.

In reply thereto, I desire to call your attention, first, to the notice of special election of School District No. 4, which provides for the submission of the question as to whether the district shall withdraw from Garfield County High School and join the Silt Union High School District for its proportion of maintaining Silt Union High School. Also to the form of ballot submitted to the voters of District No. 4, which states merely, *for* or *against* the withdrawing School District No. 4, Garfield County, from the Garfield County High School District and uniting the same with Silt Union High School District. Also, the Session Laws 1909, at page 407, which provides, among other things, "No school district in any county shall be taxed without its consent for the support of more than one class or kind of high school."

There is no provision in the school laws which permits or enables a district belonging to a county high school district to withdraw from said high school district, and therefore, in view of this fact, we conclude that no district which is a part of a high school district can withdraw from said district.

Analogous to the question which you have submitted, is the case of State *ex rel.* Bell vs. Thaanum *et al.*, 132 Pac., 726, a Washington case, where the Supreme Court held that where one school district which forms a part of a union high school district attempts to withdraw from such union high school district and become affiliated with another union district, its attempt is a nullity, as no statute of that state permits them so to do. The court, in its opinion, states that the legislature did not contemplate consolidation of districts situated as were the districts in that particular case.

In the question submitted by you, we have practically the same state of facts, except that the district attempting to withdraw forms a part of a county high school district rather than a part of a union high school district; in other words, the holding of the Washington court would substantiate a conclusion as follows: In the absence of legislation to that effect that one district forming a part of a union high school district (or as, in this instance, a part of a county high school district) can withdraw from said union (or county) high school district and become consolidated with another district, no such right exists.

Having concluded therefore that District No. 4 had no power whatever to withdraw from the county high school district to which it was attached, we conclude also that the action of the electors of said district, in voting as they did at the election, cannot be construed as a consent on the part of the district to become subject to taxation for both the Silt Union High School District and the Garfield County High School District. The primary object of the election was not only to transfer District No. 4's maintenance tax to the Silt Union High School District, but also to withdraw from the Garfield County High School District, and, this being the case, we conclude that since the district had no authority whatever to withdraw from the County High School District, its attempt to withdraw therefrom and become affiliated with the Silt Union High School District cannot be construed as a consent to taxation in both districts.

Therefore, the Silt Union High School District has no right to receive maintenance revenue or any portion thereof from District No. 4.

Yours very truly,

FRED FARRAR,
Attorney General.

By RALPH E. C. KERWIN,
Assistant.

(September 10, 1915.)

Irrigation district interest coupons are deemed receivable in payment of district interest taxes of the corresponding year but no other, nor as purchase price of a certificate of purchase.

Action to obtain correct interpretation advised.

Mr. J. C. L. Valdes,
County Treasurer, Costilla County,
San Luis, Colorado.

Dear Sir: Replying to your two letters of date August 24th and 25th and to the inquiries therein contained:

You first ask: "Can the county treasurer legally accept Trinchera Irrigation District interest coupons due December 1, 1915, in payment of interest taxes of said district for the year 1914?"

By this inquiry I infer and for the purposes of the reply thereto assume, that by your use of "for the year 1914" you mean the interest tax which under the present system of levying taxes was levied by your county commissioners some time last fall, but which, in fact, was not due or payable until January 1, 1915.

To the foregoing inquiry and upon the foregoing assumption, my judgment is that you are warranted in accepting such coupons in payment of such taxes.

Your next inquiry is as follows: "If your answer (referring to the foregoing inquiry) should be Yes, would you change it to No if interest coupons due June 1st, 1915, remained partly unpaid on account of lack of funds?"

To this my reply is that I would not change the answer given to the foregoing question.

There is nothing in the statute which either makes it your duty or permits you to do otherwise than accept the interest coupons when tendered in accordance with the statute, without any regard as to whether or not the district is delinquent.

You further ask the following question:

> "Can the county treasurer legally accept Trinchera Irrigation District interest coupons maturing in 1915 in payment of interest taxes of said district levied for 1913 and prior years?"

My judgment as to this proposition is that you cannot; that the levy made, say in the fall of 1912, could have been met by and with the 1913 coupons, as the assessment and levy was made, among other things, for the purpose of paying the 1913 coupons, but that the 1914 coupons, as an illustration, cannot be met by the taxes received in 1913, as such taxes were not levied for the purpose of meeting 1914 coupons; nor can the 1915 coupons be used to offset a levy and assessment which was made for a different purpose.

The 1915 coupons should be provided for in the taxes payable in 1915, and against such taxes and such taxes only, are the 1915 coupons an offset. In other words, each year should sustain its own assets and its own obligations.

The fourth question submitted by you is as follows:

> "If Yes, would the answer be the same where the tender is made for amount due on a tax certificate of purchase to be assigned at less than statutory value under an order of the Board of County Commissioners?"

This question is really subject to two constructions and I do not of course know which you had in mind in making the inquiry, and therefore will give you my best judgment upon each theory.

If by the inquiry you mean to refer to endorsing the taxes on the certificate as having been paid by 1915 coupons, then, having answered the third question in effect that 1913 taxes cannot be paid with 1915 coupons, of course it necessarily follows that you cannot make the endorsement upon the tax certificates of 1913 taxes paid by 1915 coupons.

However, by the question it may be inferred you mean whether or not the price paid to the county commissioners for the assignment of the tax sale certificates may be paid in interest coupons. If this is your inquiry, my answer is that it cannot be so paid, but that the sale price from the county commissioners to any assignee of a tax certificate must be paid in cash.

I wish to call your attention to the fact that the statutes under investigation and upon which the replies hereinbefore given are predicated, have not received any judicial construction in this State nor, so far as I can find, in any other State, and you must

therefore necessarily consider this letter as expressing only our best judgment as to what a construction eventually adopted by the courts would be.

This opinion of course does not justify you in any manner and would not protect you should the eventual construction adopted by the court and our construction differ. It would, therefore, be a safer policy to force the institution of mandamus proceedings and have a construction made by the court and the decree of the court behind you in whatever course was ordered. We make this last suggestion simply for your consideration.

Yours very truly,

FRED FARRAR.

Attorney General.

By CLARENCE M. HAWKINS,

Assistant.

(September 10, 1915.)

Liability to delinquent tax sale, for subsequent taxes, of property bid in for the county.

Hon. F. B. Webster,

San Luis, Colorado.

Dear Sir: Replying to your letter concerning the advertisement of lands upon which taxes have not been paid, where the land is struck off to the county:

You state: "Costilla county is the holder of a large number of tax sale certificates on tracts of land in Costilla county. On many of these tracts the 1914 taxes are now delinquent.

"Is it the duty of the county treasurer to endorse the delinquent 1914 tax on those certificates, or has he the power to advertise the same lands for sale for the 1914 tax and issue new tax sale certificates thereon?"

The authority for advertising delinquent lands for sale by the county treasurer is contained in Section 5706, R. S. 1908. This Section 5706 should, of course, be read in conjunction with Section 5713, R. S. 1908.

The only authority the county treasurer has to sell lands for delinquent taxes applies to a list which comprises "a list of all lands and town lots *subject to sale.*" It therefore follows necessarily that if the land is not subject to sale for delinquent taxes, then it is not properly within the list.

It likewise is true that if there is no delinquent tax against the land it cannot be subject to sale; and it furthermore is true that unless there are unpaid taxes charged against the land, the land is not subject to sale, and a tax cannot be unpaid or delinquent unless it was payable at a fixed time in the past.

Said Section 5713 specifically provides as follows:

"No taxes assessed against any lands purchased by the county under the provisions of this section shall be payable until the same shall have been derived by the county from the sale or redemption of such lands."

Based upon these two sections, as well as fairness to the county, it seems to us that there is no delinquent tax chargeable against the lands which is payable while the county holds the same, and, there being no tax payable, there can be no delinquent tax, and there being no delinquent tax, there can be no such lands subject to sale, and that such lands are not properly within a delinquent tax sale notice, and that the treasurer has no authority to have the same advertised, and that the county is fully justified in refusing to pay the advertising fees thereon.

We trust this answers fully your inquiry.

Very truly yours,

FRED FARRAR,

Attorney General.

By CLARENCE M. HAWKINS,

Assistant.

(September 20, 1915.)

Procedure in the case of an estray having a brand claimed by two or more distinct persons.

Manner of designation of the official live stock paper.

The State Board of Stock Inspection Commissioners,
Denver, Colorado.

Gentlemen: I have received from your board a number of questions upon which you ask my opinion. The questions and my answers follow:

"In case a party claims to have a mortgage on an animal or animals branded with some certain brand, but claimed by the State Board of Stock Inspection Commissioners as an estray under the law, what procedure must said party take to obtain possession of same, provided the State Board of Stock Inspection Commissioners decline to release the said animal or animals. See Revised Statutes, Sections 6415, 6416 and L-09, page 508, Sec. 1, Amending Sec. 6418, R. S. 1908.

"For instance: Eleven different parties have the O brand of record, and suppose the mortgage covers cattle branded O, how does the mortgagee know the estray with this brand on is one covered by the mortgage he holds, the animal not being in the hands of, or on the range of, the mortgagor?"

These two questions may be answered together. In the first place, the claimant of the animal or animals in question, in the event that the stock inspection commissioners decline to release the animal or animals, may bring a suit to regain possession of them, in other words, he may bring a replevin action. Where there are a number of different persons who claim the same brand, it is simply a question of fact to be established by the claimant that the animal or animals in question belong to him. There is no particular problem involved and the board should not be occasioned any particular trouble in this regard.

The other questions are:

> "Before designating any paper as the official live stock paper, is the Board required to ask for bids from the various publications before making such designation?
>
> "In considering what paper shall be designated as the official live stock paper, what class of papers shall the selection be made from?
>
> "Is the Board required to designate such a newspaper for a stated period of time?
>
> "Is the Board required to advertise for bids for publishing the official advertising of the Board?"

In answer to these questions, I beg to say that the law does not require you to advertise for bids before making the designation of a live stock paper. Neither need you designate that paper for any stated period of time.

The only question that may cause some difficulty is what shall be considered a live stock paper. The statute, Section 6434, Revised Statutes, 1908, reads as follows:

> "It shall be the duty of the state board of stock inspection commissioners, as soon as possible after the passage of this act, to designate a live stock newspaper, of general circulation among the cattle and horse owners of the state, as the official state live stock paper, wherein all estray notices and advertisements of estrays may be legally made. In case of a change being made in the selection of such paper, the paper then publishing these notices shall publish a notice of said change for at least thirty (30) days."

An examination of the classification made by persons dealing with newspapers seems to reveal that there is a definite classification known as live stock publications. It is undoubtedly the intention of the law that these estray notices shall be published in some paper of general circulation which reaches live stock men. They are the persons most interested in the matter, and any paper which devotes its columns primarily to some other line of business or a paper of merely general interest as a newspaper cannot, in my judgment be called a live stock paper. I might illustrate by saying that there are recognized papers dealing with matters of interest

to the farmer, papers dealing with lumber interests, papers whose principal aim is to deal with things of primary interest to women, etc. It seems to me that the intent of the framers of this statute was that these notices should go into a publication which is designed primarily to deal with the live stock industry. I have consulted several national newspaper directories, and I find that there are papers all throughout the United States which are recognized as live stock papers, and undoubtedly it is a paper of this character in which these notices should be published. Moreover, the paper must have a "general circulation among the cattle and horse owners of the state."

In answer to your question as to whether or not you are required to advertise for bids for publishing the official advertising of the board, I beg to say that if you have in mind other notices than these estray notices, I would prefer to have a specific question or questions propounded. I am,

Yours very truly,

FRED FARRAR,
Attorney General.

(September 22, 1915.)

Tenure of Irrigation Division Engineers.

Hon. H. E. Mulnix,
Auditor of State,
Denver, Colorado.

Dear Sir: In reply to the question which you have submitted as to who are the proper persons to receive payment as irrigation division engineers in Divisions 1, 2, 4 and 5, I beg to say that in my opinion the old officers are entitled to full recognition and the persons named by the present Governor as their successors have no right whatever.

The original act creating the office of irrigation division engineer, found in Session Laws of 1903 at page 281, as well as the amendatory act, found in Session Laws 1911, at page 469, provides that

> "The Governor shall, subject to confirmation by the senate, appoint five persons who shall be known as Irrigation Division Engineers," etc.

These acts also provide that each irrigation division engineer shall hold office for a specified term "or until his successor shall have been appointed and qualified and shall be removed only for malfeasance in office, incompetency or neglect of duty."

In view of the above provisions, an irrigation division engineer cannot, without his consent, be superseded after his specified term expires except by one who has not only been appointed by the Governor, but also confirmed by the senate.

The new appointments in question were made after the Senate of the 20th General Assembly had adjourned, and there was, consequently, no senate confirmation.

You will notice by reference to Section 5, Session Laws 1903, page 282, that even in case of a vacancy the appointment to fill the same requires a confirmation by the senate. Of course, where, as in Division No. 3, an appointment is made without confirmation and no question is raised by the officer whose place is attempted to be filled, the new appointee becomes what is called in law a "de facto officer" and may properly be recognized by you while he so continues.

The new appointees do not claim to have any rights by virtue of any appointment under the civil service laws of the state. The question whether the office of irrigation division engineer is now under the civil service law is therefore not discussed.

I am informed by Mr. Weiland, the State Engineer, that the old officers are recognized by his department. So there can be no doubt about their actually performing the duties of the office.

Very truly yours,

FRED FARRAR,
Attorney General.

By FRANCIS E. BOUCK,
Deputy.

(September 24, 1915.)

What must be included in the advertisement of sale of state lands by the State Board of Land Commissioners.

State Board of Land Commissioners,
John F. Vivian, Register,
Denver, Colorado.

Dear Sir: In answer to your letter of recent date in which you state that there are some fifty sales of state lands upon which you are withholding certificates of purchase because, in the published notices or advertisements of these sales the terms of payment were not included, and inasmuch as the statutes of this state require that the terms of sale be advertised, you assume that the expressions "terms of sale" and "terms of payment" are one and the same thing.

Section 5184 of the Revised Statutes, 1908, is as follows:

"The state board of land commissioners may at any time direct the sale of any state lands, except as provided in this act, in such parcels, to actual settlers only, or to persons who shall improve the same, as they shall deem for the best interests of the state and the promotion of the settlement thereof: Provided, That no lands belonging to the state, within the areas to be irrigated from works constructed or controlled by the United States or its duly authorized agents, shall here-

after be sold except in conformity with the classification of farm units by the United States, and the title to such lands shall not pass from the state until the applicant therefor shall have fully complied with the provisions of the laws of the United States and the regulations thereunder concerning the acquisition of the right to use water from such works, and shall produce the evidence thereof duly issued. After the withdrawal of lands by the United States for any irrigation project no application for the purchase of state lands within the limits of such withdrawal shall be accepted, except upon the conditions prescribed in this section. All sales under this act, except those to the United States, shall be advertised in four consecutive issues of some weekly paper of the county in which such land is situated, if there be such paper; if not, then in some paper published in an adjoining county, and in such other papers as the board may direct. The advertisement shall state the time, place and terms of sale, and the minimum price per acre fixed by the board of each parcel, below which no bid shall be received; *Provided*, That in all cases the land shall be offered in legal subdivisions of not less than forty (40) acres, or more than one hundred and sixty (160) acres; *Provided*, That sales of state lands shall be made to citizens of the United States, and to those who have declared their intention to become such only. If any land be sold on which surface improvements shall have been made by a lessee, said improvements shall be appraised under the direction of the state board. When lands on which such improvements have been made are sold, the purchaser, if other than the owner of said improvements, shall pay the appraised value of said improvements to the owner thereof, taking a receipt therefor, and he shall deposit such receipt with the state board before he shall be entitled to a patent or certificate of purchase. All such receipts shall be filed and preserved in the office of the state board of land commissioners."

This section, subject to the exceptions noted in it, seems to be substantially complete within itself. It vests a certain discretion in the state board of land commissioners as to the conditions upon which the land will be sold, that is, "to actual settlers only, or to persons who shall improve the same as they (the state board of land commissioners) shall deem for the best interests of the state and the promotion of the settlement thereof." You will note that later the section provides that the advertisement shall state the time, place and terms of sale and the minimum price per acre fixed by the board below which no bids shall be received.

The next section, 5185, provides for the terms of payment. It is not necessary to quote the section at length, but the language "terms of payment" is significant, and these terms of payment are definitely fixed and are dependent upon the amount per acre at which the land is sold, except in the case of timber sales, for which cash is required on the date of sale. It will be noticed that the

board is given no discretion in the matter of fixing these terms of payment and the only variation from the annual payments therein specified seems to be that the purchaser can pay in full if he so desires.

It is my opinion that, while it might be advisable, as a matter of convenience, to apprise prospective purchasers of the number of years within which they have to pay for state lands purchased—that is to say, the amount and number of the annual installments—nevertheless it is not absolutely a prerequisite to a valid sale that such notice be given, in other words, I think the statute clearly draws a distinction between the "terms of payment" and the "terms of sale." You are required to advertise the time, place, terms of sale and minimum price. As soon as the minimum price is known to a prospective purchaser he then is bound to take notice that the statute relative to the terms of payment applies, and that he is given a certain number of years within which to pay, in annual installments, that purchase price. If the land sells for more than that minimum price, then the relative number of installments, according to the scale fixed in Section 5185, applies.

Furthermore, it is my judgment that in the use of the expression "terms of sale" the legislature had in mind the conditions under which the land would be sold or the requirements which would be exacted of the purchaser—that is to say, whether or not the sale would be limited to actual settlers, or whether or not the state board of land commissioners would require certain improvements to be made, and if so, what these improvements should be.

I find that the word "terms," as used in this connection, has been judicially construed to mean the "conditions, propositions, stipulations." It is therefore my judgment that the sales in question, other things being proper, are valid and that the certificates should issue.

Yours very truly

FRED FARRAR,
Attorney General.

(October 1, 1915.)

The salary of the superintendent of the mineral department in the office of the State Board of Land Commissioners is covered by a continuing appropriation (Sec. 6215, R. S. Colo., 1908).

The Governor's signature is not necessary to authenticate a voucher of the State Board of Land Commissioners.

Hon. Harry E. Mulnix,
Auditor of State,
Denver, Colorado

Dear Sir: I have your letter of September 30th containing some questions relative to the State Board of Land Commissioners and in answer thereto I beg to advise you, first, with reference to the salary of H. W. Havens as superintendent of the mineral department. You state that the item for this office, contained in the

general appropriation bill passed by the Twentieth General Assembly, was vetoed by the Governor. I beg to advise, however, that in my judgment it was not necessary in order that this salary be paid that there be appropriation therefor in the general appropriation bill.

The Supreme Court of this state has recognized appropriations which are termed "continuing appropriations" and in various cases which have been decided by that court, certain statutory appropriations have been held to be continuous. This particular office was established by statute (See Section 6215 of the Revised Statutes of Colorado, 1908,) and it provides, among other things, that the State Board of Land Commissioners are authorized and directed to establish a mineral department and appoint a superintendent of the same at a salary of two thousand dollars annually. The duties of this commissioner are then set forth. There is nothing further left to be done by the legislature in establishing this office and providing the salary. There is no condition or contingency which may intervene. There is simply a direction of the establishment of the department and the appointment of a superintendent whose salary is fixed. The statute is silent as to the fund from which this salary shall be paid and in that event it naturally follows that the salary should be paid from the general revenue of the state.

It is my judgment that this constitutes a continuing appropriation for this salary and as Mr. H. W. Havens is the superintendent in this office and has been for a number of years, he is entitled to this salary.

You state that vouchers for the salaries of other employes of the state land office have been signed by the Governor, but that the voucher for Mr. Havens' salary is not signed by the Governor. I beg to advise that the Governor's signature is not necessary upon any voucher for the payment of salaries or expenses of the State Board of Land Commissioners or their employes. At one time the Governor was ex-officio a member of that board, but under a constitutional amendment adopted at the general election of 1910 the board was changed and the state officers who were ex-officio members were eliminated and a board of three commissioners, to be appointed by the Governor, was provided for. Therefore, the Governor is no longer a member of the board and his signature upon the vouchers is in no manner necessary. I believe that these vouchers should bear the signatures of at least two members of the board, unless the board should, by proper action, authorize some person to sign these vouchers in its behalf, and this it has not done.

I believe that the voucher in question for Mr. Havens' salary for the month of September bears the signature of the president of the board and the register. It therefore constitutes a valid voucher, other things being proper, for the payment of this salary. I am,

Yours very truly,

FRED FARRAR,
Attorney General.

(October 22, 1915.)

State institutions are entitled to have their premiums under the Workmen's Compensation law paid out of the appropriation in that act, and are not required to pay them out of their fractional mill levies.

Hon. H. E. Mulnix,
Auditor of State,
Denver, Colorado.

Dear Sir: In answer to your inquiry as to the appropriation of $20,000 made by the 20th general assembly for the purpose of paying the premiums that may become due the state compensation insurance fund in compliance with Section 44 of the act, which provides that the auditor shall draw his warrant in favor of the treasurer on the state compensation insurance fund for a sum equal to one per cent of the amount expended by the state during the last preceding six months for the service of persons in its employ who are subject to the provisions of the act, I beg to advise that, in my judgment this appropriation is designed and intended to cover the premiums which are due upon the employes of the state institutions insofar as these employes come within the provisions of the act.

It has been suggested that the state institutions, particularly those which have revenue derived from fractional mill levies, should pay this premium from those revenues. I do not intend to say that this can not be done in case of absolute necessity, but, in my judgment, it was not the intention of the legislature that it should be so paid. Prior to this year, we had no such an institution in this state as the Industrial Commission nor the Workmen's Compensation Insurance, and, in view of the silence on the part of the legislature in this regard, I believe that it was not intended that the institutions should assume the burden of this premium. After all, these institutions are merely agencies of the state, and the money which they receive for their support is appropriated to them by the state, and inasmuch as they are not specifically singled out and a method for the payment of their premiums prescribed, different from the method which prevails as to the state itself, it is my judgment that the premiums incurred in behalf of such institutions should be borne out of the $20,000 appropriated for the payment of the state premiums.

Yours very truly,

FRED FARRAR,
Attorney General.

(October 22, 1915.)

Validity of claims for expenses incurred outside of the state by members of the Colorado Tax Commission and by the Superintendent of Public Instruction.

Hon. H. E. Mulnix,
Auditor of State,
Denver, Colorado.

Dear Sir: I have your inquiry in which you ask whether or not you will be justified in issuing warrants in payment of expenses incurred by members of the Colorado State Tax Commission and by the Superintendent of Public Instruction in attending conventions, outside the state, relative to their respective departments, and in answer, I beg to advise that I believe that these expenditures may properly be authorized by the state auditing board. If the auditing board has approved requisitions and the bills are in accordance with the requisitions, I believe that you are justified in issuing the warrants.

The law creating the tax commission, chapter 216, Session Laws 1911, contains the following:

> Section 11: "The Commission may confer and meet with officers of other States and officers of the United States on any matter pertaining to their official duties."

And in the general appropriation bill for the current biennial period, I find appropriated for the expense of the Superintendent of Public Instruction, the following:

> "Traveling expenses of Superintendent and deputy (including expenses of Superintendent when traveling outside of Colorado on official business),"

$900.00 for each of the fiscal years 1915 and 1916.

It is my judgment that it was undoubtedly the intention of the legislature that these officers might be permitted to incur expenses outside of the state when their official duties made it necessary. The discretion as to incurring these expenses lies with the auditing board, and if that board has authorized the expenses regularly, I see no reason why they should not be paid.

You will understand that by this opinion I do not intend to lay down the bars for all officers of the state who may desire to travel beyond the limits of the state. The same rule would not govern in all cases.

Considerable confusion has arisen in the popular mind relative to the question of expenses incurred outside of the state by reason of the language in the case of Carlile vs. Hurd, 3 Colo. App., 11. In my judgment, this opinion is not as broad as it is generally supposed to be. The case had to do with the expenses incurred by the deputy Superintendent of Insurance in examining a company outside of the State of Colorado and also in attending the convention

of insurance commissioners. The court says that the legislature had not authorized or empowered him to make the examination outside of the State of Colorado and that therefore his expenses in that connection were incurred in the performance of an act which he had no authority to do. The court says, on page 16:

> "It is probably to be regretted that the legislature failed to grant the authority to make these examinations at the home offices of the companies, and to provide for the payment of the expenses necessarily incident to the investigation, for although the grant could only cover and legitimate the expenses, the enforcement in case of refusal would lie in withdrawing any permit which might have been issued. The right, however, was not conferred, and these officers could not rightfully disburse any of the state's moneys in payment of expenses incurred while visiting other states, regardless of the purpose for which they went or the usefulness of the investigation."

In the cases under consideration, it is my judgment that the legislature has authorized these expenditures outside of the state, and, of course, insofar as the insurance commissioner's office is concerned, the law, as it existed when the case of Carlile vs. Hurd was decided, has been materially changed.

I wish to reiterate that I do not intend by this opinion to hand down a general rule, but as cases arise, I will be pleased to give them consideration if you so desire.

I might add, although you have not asked for it, that the language of the appropriation bill relative to the Public Utilities Commission is similar to that of the Superintendent of Public Instruction. It reads:

> "Traveling expenses, commissioners and employes (including expenses when traveling outside of the State of Colorado on official business),"

$3,000 for each fiscal year. That, in my judgment, would place them in the same class as the Superintendent of Public Instruction in that regard.

Yours very truly,

FRED FARRAR,
Attorney General.

(October 25, 1915.)

Jurisdiction of Public Utilities Commission over automobile lines.

To the Honorable,

The Public Utilities Commission of the State of Colorado.

Gentlemen: You have requested the opinion of this department on the following questions:

> "1. Under sub-section (b) of Section 1, and sub-section (e) of Section 2, of the Utilities Act, has the Commission juris-

diction over automobile companies carrying passengers or freight into the mountain resorts, or to other points in the State of Colorado, to which no railroad line extends?

2. Over automobile owners or companies operating one machine or more between points where railroads operate?

3. If so, must the individual or company owning the automobile or automobiles maintain a schedule with the Commission, the same as other common carriers or utilities?

4. Does sub-section (e) of Section 2 exclude all common law carriers not included within the definition of common carrier in this section?

5. Please answer in regard to Section 3 as well, and whether or not owners of automobiles carrying passengers for hire come under Section 3.

6. Has the Commission jurisdiction over the Denver Omnibus & Cab Company, either under the rule of common law or under the Act? This company has filed its schedule with us and recognizes our jurisdiction at this time. There is a late case from a court in the District of Columbia deciding that the Utilities Commission has jurisdiction over the omnibus company of the city of Washington, D. C."

In answering these inquiries, it is necessary to review the scope of the jurisdiction of the Public Utilities Commission.

Considering the original act, chapter 127, Session Laws 1913, together with the amendments shown by chapters 133 and 134 of the Session Laws, 1915, the statutes provide, Section 1:

"This act shall be known as the 'Public Utilities Act,' and shall apply to the *public utilities and public services herein described* and to the commission herein referred to."

Section 3 of the original act is as follows:

"The term 'public utility,' when used in this act, includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, person or municipality operating for the purpose of supplying the public for domestic, mechanical or public uses, and every corporation, or person now or hereafter declared by law to be affected with a public interest, and each thereof, is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this act; Provided, that nothing in this act shall be construed to apply to irrigation systems, the chief or principal business of which is to supply water for the purpose of irrigation."

This section was, in effect, enlarged by the 20th General Assembly by the passage of chapter 133, Session Laws 1915, which reads as follows:

"Any person, firm, association of persons or corporation, now or hereafter engaged in transporting passengers, freight or express for hire in this state in any automobile or other vehicle whatever, and operating for the purpose of affording a means of transportation similar to that afforded by railroads or street railways, and in competition therewith by indiscriminately accepting, discharging and laying down either passengers, freight or express, between fixed points or over established routes is hereby declared to be affected with a public interest, and to be a public utility, and subject to the laws of this state now in force and effect or that may hereafter be enacted pertaining to public utilities."

Going back now to Section 2 (e) as amended by the 20th General Assembly, chapter 134, Session Laws 1915, we get the definition of the term "common carrier." The section as amended reads as follows:

"The term 'common carrier,' when used in this act, includes every railroad corporation; street railroad corporation; express corporation, dispatch, sleeping car, dining car, drawing room car, freight, freight-line, refrigerator, oil, stock, fruit, car loaning, car renting, car loading; and every other corporation or person affording a means of transportation, by automobile or other vehicle whatever, similar to that ordinarily afforded by railroads or street railways, and in competition therewith, by indiscriminately accepting, discharging and laying down either passengers, freight or express between fixed points or over established routes; and every other car corporation or person, their lessees, trustees, receivers, or trustees appointed by any court whatsoever, operating for compensation within this state."

These four sections, taken together, determine the subject-matter of the jurisdiction of your commission, and it is my judgment that you have no greater jurisdiction in this regard than that conferred by the express or implied terms of these sections. In other words, the jurisdiction of your commission does not extend to any public utility not mentioned expressly or by implication in this act. This rule will have the effect of a restrictive construction of the act, but, in view of the language quoted, I can read this law in no other way.

The language in Section 3, "now or hereafter declared by law to be affected with a public interest," clearly indicates, in my judgment, that it was the intention of the legislature to give you jurisdiction over the public utilities mentioned and such others as the legislature of the state might, from time to time, add to the list.

Applying these principles, then, to your questions specifically, it is my opinion:

First. That the commission has jurisdiction over automobile companies operating for the purpose of affording a means of trans-

portation similar to that afforded by railroads or street railways and in competition therewith, by indiscriminately accepting, discharging and laying down either passengers, freight or express between fixed points or over established routes. The language "affording a means of transportation similar to that afforded by railroads or street railways" is, I believe, defined by the remainder of the clause last quoted, that is "in competition therewith, by indiscriminately accepting, discharging and laying down either passengers, freight or express between fixed points or over established routes." Therefore, in order that you may assume jurisdiction, I believe that the automobile or automobiles in question must compete with the railroads or street railways, accept passengers, freight or express indiscriminately for transportation over established routes or between fixed points.

This will, of course, exclude the class of service which might be termed livery. By that I mean the carrying of freight, passengers or express not indiscriminately and not between fixed points nor over established routes, but upon such conditions as the immediate occasion may require.

Several questions of fact will, of course, have to be determined. There may be some question, at times, as to what may be considered competition, and as these questions arise, I will be glad to assist you in specific cases as your needs may require.

This also answers your second question, and the answer to the third is obvious. Automobiles operating under the conditions mentioned become public utilities and are subject to the Public Utilities Act, as are the other defined public utilities.

Your fourth and fifth questions have also been answered. In my judgment, all common law common carriers not included within the definition of the act are beyond the jurisdiction of the commission.

Your sixth question refers to the Denver Omnibus & Cab Company. I have given you my judgment of the law and the answer to your question is merely the application of the rule to the facts as they pertain to this company. If it operates automobiles under the conditions defined in chapter 133, Session Laws 1915, or under Section 2 (e) as amended, such service is within your jurisdiction, otherwise it is not.

I beg to advise that I have examined the reports of a number of cases decided by various public service commissions in different states, some of which hold that the so-called "jitney bus" comes within the jurisdiction of the statute under which the commission operates, but each case discloses such a difference in language from that used in the Colorado statute that the decisions in question have little weight or no weight as precedents. I am,

Yours very truly,

FRED FARRAR,
Attorney General.

(November 3, 1915.)

Power of school district or board of education to provide a free dental clinic for poor children.

To The Honorable,
The Board of Education,
Colorado Springs, Colorado.

Gentlemen: In answer to your inquiry of recent date as to the legal right of the board of education to maintain a dental clinic in Colorado Springs where the children whose parents are unable to provide dental services may receive the services of a dentist free of charge, and in which I assume that you refer to children of school age, or, more particularly, children attending the public schools, I beg to say that, in my judgment, school districts or boards of education have no greater authority than that conferred by law.

There is no detailed constitutional authority vested in a board of education or school districts. They are provided for by constitutional provision. Statutes of the state must therefore be looked to for the authority which exists in the school boards. Generally speaking, these powers are prescribed in Sections 5924 and 5925 of the Revised Statutes of Colorado, 1908, although additional powers for specific purposes are given in other sections. In none of these sections do we find any express power to maintain an institution such as the clinic you have in mind. It might be argued that Section 2954, which provides that "Any school board shall have power to make such by-laws for their own government and for the government of the public schools under their charge as they may deem expedient, not inconsistent with the provisions of this act," etc., would give the implied power to conduct a dental clinic. However, the legislature of the state, in the year 1909, passed a law (Session Laws 1909, chapter 203, page 490) which provides, among other things, for the physical examination of children and for their treatment in case the parents or guardians are financially unable to afford them proper treatment.

In the physical examination provided for, we find that teeth are specifically mentioned. It is not necessary to go into detail into the machinery provided for this examination and this treatment, suffice it to say that, in the event that the parents or guardians cannot afford the cost of proper treatment, an examination shall be made by the county physician, and "if he be unable to properly treat such child, he shall forthwith report such fact to the county commissioners of the county, with his recommendation." The act is silent as to what the county commissioners shall do. However, the inference is that the county commissioners shall provide for the proper treatment, and this, I believe, they have full authority to do.

The existence of this statute last referred to seems to give the only authority for the conduct of a clinic such as you have in mind. It stands to reason that if a child has defective teeth, the county

physician, presumably not a dentist as well as a physician, is not in a position to provide the necessary treatment, and that the proper treatment should be afforded by the county commissioners.

I believe few will deny the necessity for proper treatment for defective teeth, and surely the maintenance of a dental clinic whereby this treatment can be given scientifically and under proper conditions is, from the standpoint of the health and possibly of the mental condition of the students, a very desirable thing. However, the board of education has no right to transcend the express or implied powers given to it by law, and if this clinic were conducted directly by the board of education, it might be ultimately held that the expenditure was ultra legal, but I can see no reason why the board of education may not do indirectly, through the board of county commissioners, under the provisions of chapter 203, Session Laws 1909, the thing which it might be forbidden to do directly.

It occurs to me that arrangements might reasonably and legitimately be made between your board and the county commissioners of El Paso County whereby this clinic could be maintained, pursuant to chapter 203, if, in the judgment of the board of education, such clinic is necessary.

Another plan also suggests itself. I understand that the clinic has already been equipped. Is it not possible that the city of Colorado Springs, through some of its departments or boards, can bear the expense of conducting this clinic? Of course, I am not familiar with the provisions of the charter and ordinances of the city of Colorado Springs, but doubtless the charter contains general provisions relative to the health of the citizens of the city, and if the school district, in its territorial limits, coincides with the territorial limits of the city of Colorado Springs, co-operation might be effected between the school board and the city. If the two territorial limits do not coincide, it would, of course, add some slight difficulty, but even that might be subject to adjustment. I remain,

Yours very sincerely,

FRED FARRAR,
Attorney General.

(November 19, 1915.)

Validity of child's endowment policy, with or without return of premium in event of death before maturity date.

Hon. E. R. Harper,
Commissioner of Insurance,
Denver, Colorado.

Dear Sir: I have your letter of November 18th, 1915, wherein you submit a specimen child's endowment policy of the Fidelity Mutual Life Insurance Company and wherein you request an opinion "as to whether or not under the laws of this state a company may issue a child's endowment policy, without return of premium in event of death before maturity date."

Section 40 of the insurance code (Session Laws of 1913, page 348) provides in part as follows:

> "From and after the passage of this act it shall be deemed unlawful for any company or person to establish or conduct within the State of Colorado the business of insuring or causing to be insured by any company or person, any infant or any minor who shall be under the age of fifteen years."

The above section has reference to life insurance and therefore the real question involved is whether an endowment policy can be construed as being life insurance.

The Supreme Court of Missouri, in the case of State vs. Orear, 144 Mo., 157, 45 S. W., 1081, 1084, quotes the following from Cooke on Insurance, Sec. 107:

> "Sometimes the contract to pay on the death of the insured is conjoined with a contract to pay on the expiration of a fixed period, should he live so long. Such a contract is called a contract of endowment insurance, *though, so far as concerns the contract to pay on the expiration of a fixed period, it is not, strictly speaking, a contract of life insurance at all.*"

The Indiana Court of Appeals, in the case of Union Cent. Life Ins. Co. vs. Wood, 11 Ind. App., 335, 37 N. E. 180, 181, quotes the following from Anderson's Law Dictionary, page 401:

> "An endowment policy is an insurance into which enters the element of life. In one respect it is a contract payable in the event of a continuance of life; in another, in the event of death before the period specified."

This question seems to have been before this department in construing the 1907 Insurance Code (which is the same as the section of the 1913 Insurance Code hereinbefore quoted), at which time the following opinion was rendered:

> "Denver, Colo., July 19, 1907.
>
> Hon. E. E. Rittenhouse,
> Commissioner of Insurance,
> Denver, Colorado.
>
> Dear Sir: Yours of June 22 last, enclosing a communication from George A. Moore, president of the West Coast Life Insurance Company, inquiring whether it would be permissible for that company to write either a life or an endowment policy upon a child under fifteen years of age, providing, that in case of death before the age of fifteen the amount payable should be simply the return of the premiums, but that after the age of fifteen there should be insurance properly computed upon the basis of the premiums paid, has been in my hands for some time and has received consideration by me.

Of course, Section 32 of the Insurance Act of 1907 makes it unlawful to insure infants under the age of fifteen years. This section, however, refers to the issuance of policies on the lives of persons under that age.

While I am not altogether clear upon the matter, and while I believe the question is one upon which no adjudication has been had, yet, having in mind the purpose which the legislature had in view in the enactment of this section, I am of the opinion that the issuance of an endowment policy, with provisions such as are indicated in the letter of Mr. Moore, would not constitute a violation of nor be obnoxious to the section of the statute to which I have referred.

I return herewith the communication of Mr. Moore.

Very truly yours,

WILLIAM H. DICKSON,
Attorney General.

By HORACE PHELPS,
Deputy Attorney General."

After carefully considering the above opinion and the authorities hereinbefore quoted, I am of the opinion that the element of life enters into an endowment policy, which provides for a return of the premium in event of death before the maturity date of the policy, and therefore is prohibited by Section 40 of the Insurance Code, if the insured is a minor under the age of fifteen years.

However, if there is no provision in the policy for a return of the premium in event of death before the maturity date, then the policy is a straight endowment and the element of life does not enter therein and it is not prohibited by said Section 40 hereinbefore quoted.

Since the specimen policy of The Fidelity Mutual Life Insurance Company provides for a return of the premium with 4% interest in the event of death prior to the maturity date, I am of the opinion that it is a violation of the prohibition contained in said Section 40 and that you should not approve the same.

Yours very truly,

FRED FARRAR,
Attorney General.

By WENDELL STEPHENS,
Assistant.

(November 24, 1915.)

Necessity of previously prepared plans and specifications as a basis for road work bids.

Mr. T. J. Ehrhart,
State Highway Commissioner,
Denver, Colorado.

Dear Sir: I am in receipt of your inquiry as to whether bids for road work which is to be paid partly out of the state road fund

may be made without the previous preparation of plans and specifications by the county. The suggestion seems to have been made that it would be proper and legal to call for bids and request the bidders to make their own plans and specifications to accompany their bids.

Assuming that the estimated cost of the work exceeds $2,000, I am of the opinion that, under Section 10 of chapter 88, Session Laws 1913, plans and specifications must be prepared by the county and approved by the State Highway Commission before the call for bids is published. Under the statute, as I read it, such plans and specifications are essential for the simple reason that bids, to be competitive, must necessarily be based upon common ground, in the shape of official plans and specifications. It therefore follows that I consider it improper to proceed with the construction of the proposed section of the South Golden road unless the plans and specifications are first prepared by the county or counties involved, followed by the approval of the State Highway Commission as stated.

Very truly yours,

FRED FARRAR,
Attorney General.

By FRANCIS E. BOUCK,
Deputy.

(December 29, 1915.)

Beer cannot legally be kept on exhibition after January 1, 1916.

The Denver Manufacturers' Association,
Frank H. Rice, Secretary,
Denver, Colorado.

Gentlemen: I have your letter of this date, in which you state that you have on display in your exhibit room beer made at Golden, Colorado.

You ask whether or not it will be legal for you to display this beer after January 1st. I beg to advise that it will not be legal. Under two different phases of the Prohibition Law you are prohibited from doing this. In the first place, you cannot keep intoxicating liquors in storage; and in the second place, you cannot advertise intoxicating liquors.

Very truly yours,

FRED FARRAR,
Attorney General.

(January 29, 1916.)

How official paper of county is designated; whether bids must first be called for.

Mr. H. J. Harrison,
County Clerk and Recorder,
Hot Sulphur Springs, Colorado.

Dear Sir: You inquire whether the law requires that the Board of County Commissioners shall designate an official paper for county printing.

I beg to refer you to Sections 1205 and 1222, as well as Section 5710 of the Revised Statutes of Colorado, 1908. You will notice that these provisions contemplate the designation of an official paper for the county.

Your second question is as to whether the official paper can be designated and a contract awarded at the statutory rate without advertising for bids.

My answer is that the designation is had without necessarily involving a bid. The board may call for bids for the purpose of determining the advisability of designating one newspaper rather than another, but this would be merely a question of policy. After the designation has been made the county authorities may enter into such contract as to payment of not to exceed the maximum rates, as they shall see fit. Or, in the absence of an express contract, the newspaper would have the right to charge the maximum rate without further action of the board.

You do not, in connection with the third question, mention the particular thing which is to be advertised or published in the official paper, but I take it that you mean the proceedings of the board as provided in Section 1221 of the Revised Statutes. Section 1222 will give you the answer if my assumption is correct.

Trusting the above covers the ground intended to be covered in your inquiry, I am,

Very truly yours,

FRED FARRAR,
Attorney General.

By FRANCIS E. BOUCK,
Deputy.

(February 5, 1916.)

Validity of claims arising out of employment of an attorney by a State department, without the consent of the attorney general.

The State Auditing Board,
Denver, Colorado.

Gentlemen: There has been referred to this department a voucher, drawn in favor of Frank McLaughlin, attorney, reading as follows:

"Part payment legal services rendered to Game and Fish Department in County Clerk's case as per requisition No. 15, $400.00,"

and my opinion is requested as to the validity of this voucher.

I have made an investigation of the circumstances under which this voucher was drawn. Requisition No. 15 referred to in the voucher contains a number of items, one of which is, in substance, as follows:

"For legal services, County Clerk's case, $750.00."

This requisition seems to have been approved by three members of the Auditing Board. There is nothing on the requisition or on the voucher in question which would indicate the nature of the legal services performed. I am, however, informed that an action was brought by the District Attorney of the First Judicial District, entitled "The People of the State of Colorado for the use of the Board of County Commissioners of the County of Arapahoe vs. Robert S. Brown." The case is now pending in the Supreme Court of this State upon writ of error, the case being taken to the Supreme Court by the plaintiff to review a judgment in favor of the defendant in the District Court.

From the record in the Supreme Court, it appears that the County Commissioners of Arapahoe County sought to recover from the defendant, Brown, certain sums of money alleged to have been retained by Brown out of moneys received by him in payment of hunting and fishing licenses, the Supreme Court of this State having heretofore held that the twenty-five cents which the county clerks were entitled to deduct out of the fee received for hunting and fishing licenses was not the personal property of the county clerk, but was to be turned in to the county treasury and accounted for.

In the action against Brown, it appears from the record that he was represented by Frank McLaughlin, in whose favor the voucher in question was drawn, and I am informed by the Game and Fish Commissioner that this is the service for which payment is sought to be made, the position of the Commissioner being that if the county clerks are entitled to receive for their personal use and benefit the twenty-five cents which is to be deducted from the amount received for each hunting and fishing license, they will use greater efforts to dispose of hunting and fishing licenses and the revenue of the department will thereby be increased. In other words, the Commissioner is of the opinion that if the county clerks can be paid for this service in excess of the fees which they are authorized by law to charge for their ordinary duties, they will be more diligent in disposing of these licenses and the State will receive an indirect benefit by reason thereof, and it was upon this theory that the employment of Mr. McLaughlin was made.

As to whether or not the Commissioner is correct in his analysis of the practical situation, we have nothing to do. The voucher

comes to this department to be tested by the law, and the exigencies of the occasion have nothing to do with it.

The voucher is invalid and the money cannot be legally paid thereunder, regardless of the fact that a requisition was previously approved. While it is unfortunate that the department secured the services of Mr. McLaughlin in good faith, relying upon the approval of its requisition in this regard, nevertheless the approval of the Auditing Board does not make legal a thing which is fundamentally illegal. It is so obvious as to need no argument that the State of Colorado cannot expend public moneys for the defense of a private party merely because the State would indirectly receive a benefit in the event that the case was decided favorably to that party.

If Mr. Brown, the defendant in the action, desired to retain counsel to defend this suit, that was, of course, his own business, but the State of Colorado was in no manner responsible for any obligation upon the part of Mr. Brown to the County of Arapahoe, and the interest which the State has in the outcome of the litigation is so remote as to be beyond proper legal recognition, such as the payment of attorney's fees would be.

In the second place, the law of this State does not give to the Game and Fish Department the right to employ counsel at the expense of the State, independent of the Legal Department of the State. There is only one possible exception to this rule, and that of doubtful validity, but, in any event, it does not pertain to the state of facts in controversy here, and it is probably just as well, at this time, to state that the various officers and departments of state, in the absence of constitutional provision or constitutional legislation, cannot prosecute or defend public suits, nor employ counsel for public work except through the Legal Department of the State.

In support of this position, I desire to cite a very recent case from the Supreme Court of the State of Illinois, entitled Fergus *et al. vs.* Russel *et al.*, 110 N. E., 130. The case has to do with various questions of appropriations, among others, an appropriation made to the Insurance Superintendent of the State of Illinois, wherein it was sought to make an appropriation to that Commission for legal services for the expenses of prosecutions for the violation of the insurance code; also appropriations to the Rivers and Lakes Commission for prosecutions for the violation of the laws over which it had direction, and also an appropriation made to the Board of Pharmacy for prosecuting the illegal sale of narcotic drugs. The court held that, regardless of these appropriations, these departments must look to the Attorney General as the chief law officer of the state under its constitution for any proceedings which the department in question might desire to take, and that they could not employ counsel independent of the Attorney General's department for that purpose, although the appropriations for the expenses of prosecutions might be available for the necessary expenses in conducting the investigations or prosecutions.

The constitution of the State of Illinois and its statutory laws are so similar to our own that I consider this decision authoritative in this state.

My conclusion is, therefore, in the first place, that the department of Game and Fish can not legally expend money for the employment of private counsel in a case in which the State was not materially affected directly; and, in the second place, that the Game and Fish Department had no authority to incur any expense in the employment of counsel in this regard independent of the Legal Department of the State.

It must, of course, be understood that this opinion is not intended to abridge the right of any person to complain of the violation of any of the criminal laws of the State, nor the right or duty of the various District Attorneys to prosecute criminal actions.

Yours very truly,

FRED FARRAR,
Attorney General.

(February 11, 1916.)

State Engineer.

Is entitled only to minimum fee for filing re-location map of ditch where no additional water right is claimed;

What he may require in statement for a claim of water right;

Cannot legally make certified copies of the correspondence of his office for third persons;

Certified copies of plans and specifications of dams; legality; fees.

Hon. A. A. Weiland,
State Engineer,
Denver, Colorado.

Dear Sir: I have your letter of recent date wherein you submit certain inquiries as hereinafter set forth and request an opinion thereon:

First. What is the fee for filing a re-location map of an outlet ditch where no additional water rights are claimed, but where the re-located ditch is situated at a somewhat higher elevation and extends a distance of five or six miles further than the original ditch?

Second. Whether the State Engineer can accept a map for filing that does not constitute a claim for water, and if so, what would be the proper filing fee for such a map?

Third. Whether the State Engineer can require each statement for a claim of water right to specify the amount claimed from each source, where the water is claimed from two sources.—for example, Spring Creek and Disappointment Creek.

Fourth. Can the State Engineer legally make certified copies of correspondence for other persons?

Fifth. Can the State Engineer legally make certified copies of plans and specifications of dams, and if so, what is the fee therefor?

First. Section 1, Session Laws of 1911, page 607, provides in part as follows:

> "Fees shall be collected by the state engineer for work done in his office as follows:
>
> For the examination and filing of each map and statement describing a claim or claims to a water right, ten dollars, if the amount of water claimed does not exceed twenty cubic feet per second and an additional dollar for each cubic foot per second claimed in excess of twenty * * *."

The above section provides that the fee therein specified shall be collected

> "For the examination and filing of *each map and statement* describing a claim or claims to a water right."

An extension to an outlet ditch certainly is a *statement* describing a claim or claims to a water right. The fact that the extended filing refers to the same water as described in the original filing does not alter the fact that the extended filing is a separate statement describing a claim to a water right.

The fee was not exacted by the Legislature for claiming a water right or for claiming an additional water right, but the fee is for the filing of the *map and statement* and the amount of the water right claimed is used simply as a basis for determining the amount of the fee to be collected for filing each map and statement.

Since no claim for a water right is made in Map No. 6, it, therefore, is not in excess of twenty cubic feet and you should collect the minimum fee of ten dollars.

Second. The second question is disposed of in the answer to the first, viz., the state engineer can file a map where no claim is made for a water right, and in such case the fee would be the minimum fee of ten dollars.

Third Section 1, Session Laws of 1911, page 674, provides for a filing in the office of the State Engineer for each specific claim

> "in such form as shall seem sufficient and satisfactory to the state engineer."

Section 2 of said act provides for the contents of the statement to be filed with the map. Although the map may contain all of the statements provided for in said Section 2, still it is not mandatory that the State Engineer should accept the same for filing for the

reason that Sections 1 and 5 of said act of 1911 vest certain discretion in the State Engineer. Section 5 is in part as follows:

> "The state engineer shall examine the map and statement, and if he shall find the data therein contained *to be sufficient and satisfactory for a clear presentation of facts concerning the claims made,* he shall endorse on each sheet of the filing 'Accepted for filing in the office of the State Engineer of Colorado on the..... day of .....'"

Mills' Irrigation Manual construes the purpose of the act to be simply a means of obtaining a good and sufficient record of the various diversion projects throughout the state which give notice of the facts therein contained to subsequent appropriators. It is of the greatest importance that subsequent appropriators should know the amount of water claimed by a prior appropriator from both the Spring and Disappointment Creeks, and, therefore, by the provisions of Section 5 of the 1911 act, a duty is imposed on the State Engineer to first determine whether the data contained in the map or the statement is sufficient and satisfactory for a clear presentation to subsequent appropriators of the necessary facts concerning the claims made.

Fourth. The State Engineer can not legally make certified copies of correspondence for other persons. Correspondence is in no sense an official record, but is filed by the State Engineer in his office simply as a convenient method of preserving the same for the information of the State Engineer and is not preserved for the use of the public.

Fifth. The State Engineer can legally make certified copies of plans and specifications of dams for the reason that they are required by law to be filed with the State Engineer and are, therefore, official records of the office. The fee therefor, according to Section 1, Session Laws of 1911, page 607, would be $1.00 for the official signature and seal of the State Engineer. As the plans are necessarily a map, the fee would be $1.00 for each hour or fraction thereof necessary for the making of such copies. The fee for making copies of the specifications would be—

> "For copies of records, twenty (20) cents per folio."

Yours very truly,

FRED FARRAR,
Attorney General.

By WENDELL STEPHENS,
Assistant.

(March 13, 1916.)

Foreign mutual hail companies cannot do business in Colorado.

Hon. E. R. Harper,
Commissioner of Insurance,
Denver, Colorado.

Dear Sir: I have your inquiry of recent date wherein you request an opinion as to whether you would be justified, under the

law, in licensing foreign mutual hail insurance companies to transact an insurance business in this state.

In 1913 the legislature of this state enacted a comprehensive insurance code wherein provision was made for the organization of domestic mutual fire insurance companies and mutual assessment accident associations. (See 1913 Session Laws, Sections 67 and 75, pages 364 and 369.)

The legislature, in the same sections, required that each of the mutuals hereinbefore mentioned should have a guaranty fund of $10,000.

Section 63 of the 1913 Session Laws, page 361, is a general section in regard to the "Guaranty Fund of Mutual Companies" and authorizes the issuance of guaranty fund certificates. Said section contains the following provision:

> "* * * but the full fund as required of each kind of mutual and assessment company by *this Act* must at all times be maintained."

The act does not make any provision whatsoever in regard to a guaranty fund for mutual hail companies.

As the legislature has failed to make any provision as to the amount of the guaranty fund for mutual hail companies, it is clear that it was the intention of the legislature not to authorize the organization of domestic mutual hail companies.

Since a mutual hail company could not be organized under the laws of Colorado, it follows that a foreign mutual hail company can not be licensed to transact business in this State.

The above conclusion necessarily follows from a consideration of the following, contained in Section 917 of the general incorporation laws of this State in regard to the admission of foreign corporations into this State:

> "* * * and such corporation shall be subject to all liabilities, restrictions and duties which are or may be imposed upon such corporations of like character organized under the general laws of this state, *and shall have no other or greater powers.*"

Thus it would be illegal for you to grant to a foreign company powers and privileges which are not accorded to domestic companies of like character.

That the legislature never intended to authorize foreign mutual hail companies to transact business in this state, is clear from a consideration of Section 73 and subdivision 5 of Section 75, 1913, Session Laws, pages 368 and 370, which sections contain specific provisions and authorization for the admission into this State of foreign mutual fire and mutual assessment accident associations.

Nowhere does the insurance code make any provision or authorization for the admission of a foreign mutual hail company.

An additional reason as to why you can not license a foreign mutual hail company to transact business in this state is that in the absence of statutory authorization, the Commissioner of Insurance is without power to grant or issue to any corporation a license to transact insurance business in this state.

For the reasons hereinbefore set forth, I am of the opinion that the law does not authorize you to license foreign mutual hail companies to transact business in this State.

Yours very truly,

FRED FARRAR,
Attorney General.

By WENDELL STEPHENS,
Assistant.

(March 15, 1916.)

Courts cannot legally require a water commissioner to divide the water of a ditch among the individual users thereof.

Hon. A. A. Weiland,
State Engineer,
Denver, Colorado.

Dear Sir: In your interrogatory of recent date, you state that in Water Districts Nos. 38 and 39, Division No. 5, State of Colorado, there have been issued certain decrees by the District Court in and for the County of Garfield, wherein, among other things, it was ordered, in the case of certain ditches, that water commissioners should superintend the placing of division boxes in the ditches and should actually make a division of the water in the ditches to the users under the ditches; the decrees in question determining the relative rights of these users, that is, the rights to the water of the ditches as between the respective users from those ditches and not their rights with respect to other ditches or appropriators under other ditches. It appears from an inspection of the decrees that there are several cases of this kind. For illustration, I find that such a decree was entered affecting the Home Supply Ditch in District No. 38, and the Rifle Creek Canon Ditch, The Grand Tunnel Ditch, The Ware & Hinds Ditch, The Raynard Ditch and the P. Tompkins Ditch in District No. 39. There may be others. An inspection of these decrees shows that in some instances they were entered either in or as collateral to general adjudication proceedings; in other instances, they were entered in cases brought by certain users of water in a ditch against other users of water from the same ditch.

You ask my judgment as to the law and the duty of the water commissioners under these decrees, stating that the performance of the duties under these decrees imposes a very heavy burden upon the water commissioners in policing the ditches in question and interferes with their duties in the distribution of the water from the streams to the various appropriators.

Two questions arise: The first is as to the validity of these decrees, and the second, the right of the executive officers of the state to question them. The two questions will be discussed together.

A review of the earlier statutes of the State of Colorado fails to disclose any definite expression upon the part of the legislature upon this subject, but obviously there is no language which can, in my judgment, be construed to require any such duty of the water commissioners. These water commissioners are officers of the state, and, while it is true that they are required, under the law, to administer the decrees of court with respect to priorities of appropriations, they do so as executive officers rather than as officers of the court.

In the case of Robertson vs. People, 40 Colo., 119, the defendant attempted to prevent the water commissioner from distributing water according to the decreed priorities. He was charged with contempt of court and found guilty. The Supreme Court reversed the case, holding that the decree was one *in rem* and not *in personam;* that the water commissioner was not an officer of the court, and while the defendant might be guilty of a violation of the law in interfering with the water commissioner, he was not guilty of contempt of court.

In Boulder Ditch Company vs. Hoover, 48 Colo., 347, the court holds that it is not within the province of the water commissioners to question the decrees determining the appropriations of water. This same doctrine has been announced in other cases. However, in these cases, the court had in mind the right of the water commissioner to question the validity of the decree determining the appropriation from the stream. In the instances presented by your letter, a different question arises. It would be manifestly improper for any water commissioner to question the correctness of a decree determining the appropriation for any ditch or ditches. It is his duty to administer the water as an executive officer of the state according to the appropriations as determined by the court in proper adjudication proceedings. In the cases here, however, we find that the court has, as between various users from the same ditch, the ditch in each instance having its adjudicated appropriation, entered a decree determining and defining the respective rights of these users among themselves, and has attempted to place upon the water commissioners the burden of distributing the water flowing in the ditch according to the decree defining the rights of the users under the ditch.

No precise case involving this question has been decided by our Supreme Court. However, in the case of the Cache la Poudre Irrigation Ditch Company, *et al.*, vs. Halley, Water Commissioner, *et al.*, 43 Colo., 32, the court uses this language:

> "A water commissioner is not required, nor is it his duty, to make any division or distribution of water between the users thereof from the same ditch; neither has he any authority to interfere with the internal management of the af-

fairs of a ditch company; but it is his duty to turn no more water into a ditch to which it may be entitled by virtue of any decree than is necessary to serve the needs of the consumers under such ditch, and refuse to turn water into any ditch for the use of anyone not entitled thereto."

The earlier statutes of the state define the duties of the water commissioners, but nowhere, as I have stated, is there any language which makes it the duty of the water commissioner to distribute the water in a ditch to the users under the ditch.

The decrees in question were rendered at various dates, for instance, the decree affecting the Home Supply Ditch was rendered on the 17th of April, 1900, and the other decrees in question were rendered at various other dates, but about that time.

In 1903, the legislature made an expression upon this subject, Chapter 130, Session Laws 1903, page 297. The title of the chapter is "An act concerning water rights," and the chapter generally has to do with the adjudication of appropriations for beneficial uses other than irrigation. Section 4 of the act makes it the duty of the water commissioner to distribute the waters decreed and to protect the prior rights of the owners of the water rights in the same manner as he is now required by law to superintend the distribution of water for irrigation purposes, and contains this language:

"Provided, however, That no water commissioner or irrigation official shall make any division or distribution of any water between the users thereof from the same ditch or reservoir."

It is my opinion that this language is merely a definite expression of the law as the same existed prior to the date of the enactment of this statute.

It is my conclusion, therefore, that the District Court had no jurisdiction to require an executive officer of the state to perform any duty other than those prescribed by the law of the state, and that under no law of the state is it the duty of the water commissioner to divide the water of a ditch among the users under that ditch. With all due respect to the court, I believe that it was without jurisdiction to enter any such an order, and inasmuch as you find that the work of the water commissioners is interfered with because of the necessity of acting as ditch riders on these respective ditches, the decrees in this regard should be ignored, at any rate until such a time as there be a further judicial expression upon the subject. It is only fair to state that the statute of 1903 was adopted after the decrees in question had been issued and the court, at that time, did not have the statute as a guide.

It must be understood that this position is taken with a desire to be governed by every proper degree of respect for the court in its decrees, but with the necessity of preventing the interference

with the proper duties of the executive officers by the fulfillment of directions given to them which are in no wise a part of their duties nor within the jurisdiction of the court to prescribe.

Yours very truly,

FRED FARRAR,
Attorney General.

(March 30, 1916.)

Jurisdiction of Public Utilities Commission over automobiles.

The Public Utilities Commission,
Denver, Colorado.

Gentlemen: I have your favor of the 27th inst. submitting five questions. It is impossible in the present stage of the law to answer these questions with certainty as to correctness of the conclusions arrived at. I have, however, spent considerable time and thought and the answers hereinafter given are believed to be correct upon principle. The questions and answers are as follows:

"1. Assume a person operating a motor vehicle between Boulder and Nederland, Colorado. Assume a railroad operating a line of railroad between Boulder and a point five miles distant from Nederland. Assume that both the railroad and the motor vehicle indiscriminately accept, lay down and discharge passengers, freight and express.

"Is the motor vehicle in competition with the railroad under the terms of the Public Utilities Act, and has the Commission jurisdiction over the motor vehicle?"

Answer: In my judgment the railroad and the motor vehicle are not in competition, since it is apparent from the question that they do not operate between the same points.

"2. Assume a person or motor vehicle company carrying passengers between Boulder and a point of destination; and assume a railroad operating and carrying passengers between Boulder and a point called 'B', and from the point 'B' connecting with a 'jitney bus' line not owned by the railroad, but operated through contract with the railroad and the 'jitney bus' line, running from 'B' to the point of destination of the motor vehicle line operating from Boulder to its point of destination.

"Does the 'jitney' line operating between Boulder and its point of destination come within the jurisdiction of this Commission by operating in competition with the railroad?

"If the railroad sells a through ticket from Boulder to the final point of destination via its connecting 'jitney bus' line, does the railroad, in that case, become a competitor within the meaning of the Colorado law, with the 'jitney bus' line?"

Answer: I do not regard the person or company operating the line of motor vehicle referred to in this question as competitors of the railroad. Certainly the railroad could not be said to be a competitor of the motor vehicle company for the same reason as indicated in the answer to question No. 1. That is, it does not operate between the same points and competition would seem to involve mutuality. The fact that the motor vehicle line operates between two points which may also be reached by patronizing first the railroad and then a second motor vehicle line does not, in my judgment, constitute the first motor vehicle line mentioned a competitor of the railroad within the meaning of the statute, nor would the case be altered, in my judgment, if, for reasons of convenience or profit, the railroad should arrange with the company meeting its trains for transportation of passengers upon the payment of one fare represented by a ticket sold by the railroad company.

"3. Assume a railroad operating its line of railroad from Boulder to a point called 'B' and from the point 'B' hauling its passengers to Estes Park by automobiles (said automobiles being owned by the railroad), and selling a through ticket over its line of railroad and its automobile line, to Estes Park.

"Does the railroad operate into Estes Park, and if so, is a 'jitney' line, operating between Boulder and Estes Park, in competition within the meaning of the Colorado law, with the railroad and its owned motor vehicle line?"

Answer: Under the facts stated in this question the railroad cannot properly be said to operate into Estes Park. In my judgment the fact that in this case the railroad owns the automobiles hauling its passengers from the railroad terminal "B" to Estes Park does not alter, in a legal sense, the situation disclosed in question two above.

"4. Assume the Union Pacific Railroad Company selling a through ticket from Denver to Estes Park. Assume that the Union Pacific connects with a motor vehicle line at Fort Collins, and that the motor vehicle line from Fort Collins carries the Union Pacific passengers to Estes Park.

"Does a 'jitney' line, operating between Fort Collins and Estes Park, enter into competition with the Union Pacific Railroad, within the meaning of the Colorado law, and would there be a difference in the event the Union Pacific owned its connecting 'jitney bus' line from Fort Collins to Estes Park?"

Answer: I do not regard what you designate as the "jitney" line as competing with the railroad for reasons stated in the answers to previous questions.

"5. ANTI-PASS LAW. The Union Pacific Railroad has requested permission of this Commission to issue a pass to the owner of the Fort Collins and Estes Park automobile line. It is the contention of the Union Pacific that the Fort Collins and Estes Park Transportation Company (said company operating between Fort Collins and Estes Park, and carrying passengers in-

discriminately), is a common carrier, therefore, that the two common carriers may exchange transportation to their respective officers.

"It has been held by the Attorney General of the State of Colorado that automobile companies not coming within the strict meaning of the Public Utilities Act, are not common carriers within the meaning of the Act, and therefore, the Public Utilities Commission has no jurisdiction over them.

"Assume that the Fort Collins-Estes Park Transportation Company does not compete with the railroad within the meaning of the Public Utilities Act. Does the Transportation Company remain a common carrier within the meaning of the common law, and if so, is an officer of the Fort Collins-Estes Park Transportation Company entitled to transportation from the Union Pacific Railroad, if the Union Pacific Railroad desires to exchange transportation?

"Does the anti-pass provision of the Public Utilities Act apply to a motor vehicle company not in competition with the railroad and thereby eliminated from the jurisdiction of this Commission?"

Answer: It may be conceded, as contended by the railroad company, that the automobile line in question is, in a sense, a common carrier. This, however, does not answer the question propounded. The only importance in this connection attaching to the character of the company as being or not being a common carrier lies in the fact that by Section 17 of the Public Utilities Act it is provided that the prohibition of the statute against giving passes shall not apply to the interchange of passes for the officers, agents and employees of common carriers.

This provision, however, must be read in the light of Subdivision E of Section 2 of the Act as amended by Chapter 134 of the Session Laws of 1915. By this section, so amended, the term "common carrier" as used in the Act is restricted in its meaning to include automobiles and similar vehicles only when operating in competition with railroads or street railroads. It follows, therefore, that for the railroad to issue a pass to the owner of the automobile line would constitute a violation of the anti-pass provision of the Public Utilities Act.

Yours very truly,

FRED FARRAR,
Attorney General,

By FRANK C. WEST,
Assistant.

(April 25, 1916.)

The law requiring a license to be taken out by a person owning or maintaining a private park in which game animals are confined is constitutional.

Hon. W. B. Fraser,
Game and Fish Commissioner,
Denver, Colorado.

Dear Sir: The correspondence between your department and Mr. J. H. Devereux, which has been submitted for my inspection, raises the question whether Mr. Devereux is required to take out a license as provided in Section 2761 *et seq.*, R. S. Colorado, 1908.

It appears that in 1893 Mr. Devereux's brother purchased certain elk, which since that time have been confined in an enclosure on land owned by the Devereux Brothers near Glenwood Springs.

The sections referred to were enacted in 1899.

In my opinion the state may, in the exercise of its police power, legally regulate the confining of game animals in captivity. For that purpose the legislature may properly require a license to be taken out by the person confining the animals. The sum exacted as a license fee in the case of a private park or enclosure, such as the one in question here, seems to be entirely reasonable. I do not perceive any ground for considering the statute invalid.

The fact that the elk were acquired before the law of 1899 was passed does not in my judgment affect the question in any way whatever, and the Devereux enclosure is subject to the license provision.

Yours very truly,
FRED FARRAR.
Attorney General,

By FRANCIS E. BOUCK,
Deputy.

(May 23, 1916.)

The problem of avoiding expense caused by arrival of non-resident paupers considered.

Miss Gertrude Vaile,
Executive Secretary, Bureau of Charities and Corrections,
Denver, Colorado.

Dear Miss Vaile: Answering your letter of December 5th last, and after talking with one of the ladies in your office, we have gone over the McElroy case referred to therein and have concluded that there is no law that will enable this state to defend itself from the influx of dependents from other states through legal proceedings. We confess our inability to turn very much more light upon the matter from a legal standpoint than you already have.

You are, of course, familiar with the provisions of Chapter CVI, Sections 4789-4803, R. S. 1908, concerning "paupers," which is about all the statute law we have applicable in any way to the matter involved. Under these provisions it is very plain as to the proceedings between counties in this state, as the authorities in one county may notify the authorities in another county from which the pauper comes and in which he has resided sixty days immediately preceding his becoming a public charge, to provide for the return of such pauper, and the provision is made to charge the support to such county and the recovery of the same.

Several states have statutes providing for forcible "transportation" or "removal" of paupers from one county to another, but, it seems, there has never been any enforcible statute providing for a removal to another state, because such statute would have no extra-territorial effect.

There are some old cases in books that seem to have set at rest any contention that one state may provide by statute for the removal of a pauper to another state, so, there are no new decisions on the subject.

The following illustrations are interesting as well as instructive:

In the case of Overseers of the Poor vs. Overseers of the Poor, 1 Vt. 464, (in which a pauper was ordered to be removed by the Overseers of the Poor in the town of Georgia in Vermont to the town of Grand Isle, another town in the same state, under a statute authorizing such removal), it was contended by the latter town that such order was wrong because the pauper's last legal "settlement" was in New York, although it was admitted that, before going to New York, he had his "settlement" in the latter town. On appeal the higher court held that the order was right, because the pauper had not obtained any settlement in the town of Georgia, and, as he had a settlement in Grand Isle before going to New York, and this being the last settlement within the state of Vermont, it must be regarded as the legal settlement under the Poor Laws, and the court said:

> "The question presented in this case is of considerable importance, and attended with some difficulty. The question is, whether the expression, "last legal settlement," in our statute, when it relates to orders of removal, means a legal settlement anywhere, or only within the state?"
>
> * * * * * * * * * * * * * * * *
>
> "I have no recollection of ever knowing, or hearing of, but one statute of this state which attempted a provision for the removal of paupers out of the state; and I find that to be the statute of 1787. Its total inefficiency was too apparent, to render probable a repetition of its provisions in a new statute."
>
> * * * * * * * * * * * * * * * *

"Any provision for removing out of the state would be a nullity, and such would be resisted by the other state."

In the case of Junita County vs. Overseers of the Poor, etc., 107 Pa. St. 68, practically the same question arose, except in Pennsylvania the statute provided for the removal of a pauper "to the city, district or place where he was last legally settled, whether in or out of Pennsylvania," and the court said:

"It may be difficult, and often impossible, to remove a pauper from this state to his place of settlement in another; this provision may be nugatory as regards its enforcement."

* * * * * * * * * * * * * * * * * * * *

"If the settlement of the pauper is in another state or county to which he cannot be removed, the district where he resides when he becomes chargeable is liable for his support."

In another case, Overseers vs. Overseers, 87 Pa. St. 294, the court said:

"It is indeed true that by our Poor Laws provision is made for the removal of paupers into other states, but this provision is nugatory in that there is no power by which it can be carried into effect; hence, the order of removal loses all force the moment it crosses the state line. In other words, the legislature of Pennsylvania cannot charge the poor districts of other states with the support of paupers, though their settlements may properly be therein, and, *per contra,* other states cannot so charge the poor districts of Pennsylvania."

From these old cases it seems there is nothing for one state to do but to take care of the non-resident paupers and rely entirely upon the voluntary disposition of the authorities at the place of the pauper's last residence or settlement in another state to pay for the support given. There is no way by which payment can be enforced by legal proceedings, so far as we are advised.

In regard to your question as to whether the Constitution of the United States in any way prevents a person from retaining his claim upon his former place of residence if he wishes to do so, and goes away temporarily, it is our opinion that there is nothing in the Constitution of the United States or of any state that would prevent any person from claiming his former home in another state as his place of residence or settlement, and there is nothing in a law anywhere to prevent the authorities of any state from calling upon the authorities of such former place of the pauper's settlement to pay for the support furnished, but there seems to be no legal remedy by which payment may be enforced.

Not expecting that this letter will be of any material benefit to you, we nevertheless submit it for what it is worth, hoping to advise you at any time upon further complications.

We return herewith the correspondence submitted to us.

Very respectfully,

FRED FARRAR,

Attorney General,

By W. B. MORGAN,

Assistant.

(May 29, 1916.)

No part of the State Compensation Insurance Fund can be legally used to purchase re-insurance.

The Industrial Commission of Colorado,
Capitol Building,
Denver, Colorado.

Gentlemen: I have your letter of May 22nd, 1916, wherein you request an opinion as to whether any portion of the State Compensation Insurance Fund could be expended as a re-insurance premium to re-insure the entire risk of the State Compensation Insurance Fund over and above $20,000.00 for any one accident.

Section 20 of the Workmen's Compensation Act (1915, Session Laws, page 529) creates a fund known as the State Compensation Insurance Fund "for the benefit of injured employees, *which shall be administered in accordance with the following provisions*, without liability on the part of the state beyond the amount of said fund, collected as provided in this act."

Section 22 of said act provides for what purposes said fund shall be applicable as follows:

> "Said fund shall be applicable to the payment of losses sustained on account of compensation and benefit insurance in accordance with the provisions of this act."

Section 23 of said act vests in the commission full jurisdiction over the State Compensation Insurance Fund and is in part as follows:

> "The commission is hereby vested with full power, authority and jurisdiction over the State Compensation Insurance Fund and may do and perform any and all things whether herein specifically designated, or in addition thereto, which are necessary or convenient in the exercise of any power, authority or jurisdiction over said fund in the administration thereof *under the provisions of this act*, as fully and completely as the governing body of a private insurance company might or could do, *subject, however, to all the provisions of this act.*"

The above section does nothing more than give to the commission the power to do everything necessary to carry out the provisions of the act, but does not give the commission any powers in addition to those specifically mentioned therein.

Section 66 of said act authorizes the State Treasurer to disburse the fund "upon warrants of the State Auditor upon vouchers authorized by the commission for *benefits legally* due to the person or persons designated in such vouchers."

Section 67 of said act authorizes the State Treasurer to deposit said funds and the interest in the same manner and subject to all provisions of the law with respect to the deposit of state funds and contains the following proviso:

> "Provided, however, That none of the funds belonging to the State Compensation Insurance Fund shall be used for any other purpose whatsoever."

In view of the limitations which the legislature has placed on the use of the State Compensation Insurance Fund, I am of the opinion that no portion thereof can be used for any purpose other than that which is specifically mentioned in the act. Inasmuch as the act does not specifically authorize the purchasing of re-insurance, it follows that no portion of said fund could be used for such a purpose.

Yours very truly,
FRED FARRAR,
Attorney General,

By WENDELL STEPHENS,
Assistant.

(June 29, 1916.)

The expense of mobilizing the National Guard for federal service on the Mexican border is a proper basis for issuing certificates of indebtedness.

Hon. Allison Stocker,
Treasurer of the State of Colorado,
Denver, Colorado.

Dear Sir: Owing to the mobilization of the Colorado National Guard in pursuance of the orders of the President of the United States, the question arises whether certificates of indebtedness can legally be issued by the State of Colorado to cover the expenses of such mobilization. In my opinion they can.

Section 6239 of the Revised Statutes of Colorado, 1908, is as follows:

> "In all cases where the laws recognize a claim for money against the state, and no appropriations shall have been made by law to pay the same, the auditor shall audit and adjust the same, and when the said claim shall have been approved by

the governor and attorney general, he shall give the claimant a certificate of the amount thereof, under his official seal if demanded, and shall report the same to the general assembly, with as little delay as possible, giving a statement in tabular form of the number, date of issue, and amount of each certificate, and for what purpose issued. No indebtedness shall be incurred, or certificate of indebtedness issued, for any purpose for which the appropriation has been made and exhausted, unless the necessity for the creating of such indebtedness, and the issuing of such certificate, is caused by a casualty happening after the making of the appropriation; and in all such cases the question of incurring such indebtedness shall be first submitted to the governor and attorney general, for their approval."

If the claims incurred as expenses of mobilization, therefore, are such claims for money against the State as the laws recognize, and no appropriation has been made or is available to pay the same, the certificates may be lawfully issued under the section just quoted.

The Constitution of the United States provides, in Article I, Section VIII:

"The Congress shall have power: * * *

"15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

"16. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.

* * * * *"

In Article II, Section II, the Constitution of the United States further provides:

"The President shall be commander-in-chief * * * of the militia of the several states when called into the actual service of the United States."

The parts of our State Constitution which are to be considered in this connection are found in Sections 1 and 2 of Article XVII:

"The militia of the state shall consist of all able-bodied male residents of the state, between the ages of eighteen and forty-five years; except, such persons as may be exempted by the laws of the United States, or of the state."

"The organization, equipment and discipline of the militia shall conform, as nearly as practicable, to the regulations for the government of the armies of the United States."

Section 4423 of the Revised Statutes of Colorado, 1908, is in the following language:

"The national guard of this state may be ordered into the service of the United States by the President of the United States for any purpose for which he is authorized to use the militia of the states by the constitution and statutes of the United States."

Recent acts of Congress,—notably the Dick Acts and the Hay Act,—have rendered the relations between the federal government and the organized National Guard in the various states much more intimate and direct than formerly. They provide for summary transfer of the state militia to the service of the United States. They likewise contemplate ultimate reimbursement by the United States of certain of the expenditures necessitated by such transfer or incidental thereto.

From a careful reading and comparison of the federal and state statutes, it is readily apparent that the mobilization which is now in progress is entirely legal and within the powers of the state government. Some of the expenses will eventually be paid by the federal government. Nevertheless, the primary liability, at least for the preliminary expenses, rests upon the state, and the claims arising thereunder are claims for money against the state such as the law recognizes within the meaning of the statutory provision first above cited.

No appropriation of state funds exists for the payment of these extraordinary expenses. The safety of the state and of the nation depends upon quick action uncomplicated by doubts as to the validity of the incurrence of these expenses, or as to the possibility of issuing certificates of indebtedness which would serve as a legal foundation for such future payment as the General Assembly may under our statutes see fit to provide.

It appears to me, then, that on fundamental principles the issuance of certificates of indebtedness as contemplated would be not only legal but eminently desirable.

Very truly yours,

FRED FARRAR,
Attorney General,

By FRANCIS E. BOUCK,
Deputy.

(July 7, 1916.)

The Horticultural Inspection Act (S. L. 1907, pp. 423-8, amended by S. L. '09, pp. 115-8) furnishes the means of combating the insect pest known as the potato tuber moth.

Hon. C. P. Gillette,
State Entomologist,
Fort Collins, Colorado.

Dear Sir: I am in receipt of your letter calling my attention to the fact that potatoes now being shipped into Denver from California are seriously infected with the potato tuber moth, which you characterize as one of the worst insect pests known to the potato plant; and requesting my opinion as to whether you can proceed to condemn and (if necessary) destroy the infested potatoes under sections 6 and 7 of the horticultural inspection act found in Session Laws 1907, pages 423-428, as amended by the act found in Session Laws 1909, pages 115-118.

Section 6 as amended in 1909 provides as follows:

"Whenever the State Entomologist, his deputy or a horticultural inspector has reason to believe, or has been creditably informed that, at any place within the State, there exists, or have been introduced or offered for sale, plants, trees, shrubs, cuttings, scions, buds, fruit *or other objects* infested by injurious insects or plant diseases that are liable to be spread to the injury of others, it shall be his duty to make an investigation of the suspected stock and premises and if they are found so infested, the State Entomologist, his deputy or the horticultural inspector of the county shall notify the owner or possessor in writing of the nature of the infestation, specifying the insects or diseases that have been found, and demanding that, within a reasonable specified time, not to exceed ten (10) days, the infested goods and premises shall be disinfected. The owner of the infested property may choose whether he will have the infested property disinfected or burned, provided the case is not of such a nature that the State entomologist deems it necessary that the infested property be destroyed by fire, and in such cases the State entomologist shall, directly or through his deputy or horticultural inspector, seize the infested property and burn it. If disinfection be decided upon and the possessor of the infested property refuses to disinfect the same in accordance with the instructions of the officer in charge, the State entomologist, or horticultural inspector shall take possession of the infested property and disinfect it as provided in this act. * * * "

The above section also provides a criminal penalty for each violation of the act and constitutes each day of failure to comply with its requirements a separate offense.

In my judgment the plain purpose of the laws above referred to is to prevent exactly the sort of insect pest which you have found in the potato shipments described in your letter. Hence it seems no forced construction of the words "other objects" in sections 6 and 7 to say that potatoes infested with the potato tuber moth are within the letter and spirit of the expression used. In fact, it is hard, if not impossible, to conceive what could have been meant by the legislature in adding these words unless my interpretation is correct.

In view of the foregoing, I beg to advise that in my opinion the statutes cited are applicable and will afford a lawful remedy to cope with the impending danger to our potato growers.

I shall be glad to keep in touch with you with reference to the proper procedure in enforcing the law in question.

Very truly yours,

FRED FARRAR,
Attorney General,

By FRANCIS E. BOUCK,
Deputy.

(July 10, 1916.)

The law requiring a license to be taken out by a person maintaining a public or private lake privately stocked with fish is constitutional.

Hon. W. B. Fraser,
Game and Fish Commissioner,
Denver, Colorado.

Dear Sir: Answering your recent inquiry as to whether the statutory provisions which require a license to be taken out by a person owning or maintaining a public or private lake privately stocked with game fish, I beg to advise you that according to my judgment the same principle governs as was referred to in my letter to you dated April 25, 1916, wherein I expressed my conviction of the validity of the same provisions insofar as they relate to parks confining game animals.

Adapting a portion of my previous letter by making the necessary verbal changes, I may apply my conclusions, therein stated, by saying: In my opinion the State may, in the exercise of its police power, legally regulate the confining of fish in captivity. For that purpose the legislature may properly require a license to be taken out by the person confining the fish. The sum exacted as a license fee, in the case of a public or private lake containing fish, seems to be entirely reasonable. I do not perceive any ground for considering the statute invalid.

As you say, there is no question of the ownership of the fish involved, the State asserting no claim under Section 2770 of the Revised Statutes of Colorado, 1908, or otherwise, in a case where none of the fish were furnished by the State.

Very truly yours,

FRED FARRAR,
Attorney General,

By FRANCIS E. BOUCK,
Deputy.

(July 11, 1916.)

The statutory attempt in R. S. Colo. 1908, Sec. 3465, to grant a free right of way over State lands and deprive the State Board of Land Commissioners of its power conferred by the Constitution, of direction, control and disposition of the public lands, is unconstitutional.

The State Board of Land Commissioners,
Capitol Building,
City.

Gentlemen: I have your request for an opinion as to whether the State Board of Land Commissioners is justified in charging an irrigation district for a ditch right of way across school land, in view of the provisions contained in Section 3465 R. S., 1908. Said Section 3465 provides in part as follows:

> "* * * The right of way is hereby given, dedicated and set apart, to locate, construct and maintain said works or reservoirs, over, through, or upon any of the lands which are now or may be the property of the state."

The Constitution of this State vests in the State Board of Land Commissioners the disposition of the public lands of the State and the legislature does not possess the power to make any disposition thereof whatsoever.

The legislature is simply vested with the power to prescribe the procedure for the disposition of the public lands, after the Board has first exercised its discretion and determined to dispose of certain land and has fixed the price thereof.

Section 9, Art. IX of the Constitution creates the State Board of Land Commissioners, " * * * who shall have the direction, control and disposition of the public lands of the state under such regulations as are and may be prescribed by law."

Section 10, Art. IX, is as follows:

> "It shall be the duty of the State Board of Land Commissioners to provide for the location, protection, sale or other disposition of all the lands heretofore, or which may hereafter be granted to the state by the general government, under such

regulations as may be prescribed by law, and in such manner as will secure the maximum possible amount therefor."

The Supreme Court of this State in *In Re Leasing of State Lands*, 18 Colo., 359, construed the phrase "under such regulations as may be prescribed by law," and at page 364 of the opinion, said:

> "So we think the provision 'under such regulations as may be prescribed by law,' means such reasonable rules as may be prescribed from time to time, by the legislative department of the government."

On page 365 of the opinion the court said:

> "It is not to be inferred from this that all legislation upon the subject would be binding upon the State Board. Should the legislature, under the guise of regulations, attempt to take away all power of disposition of the state lands from the State Board, or should laws be enacted for the manifest purpose of favoring other than the highest bidder, such acts would be manifestly in violation of the constitution, and void."

Therefore that portion of Section 3465, R. S. 1908, hereinbefore quoted, is unconstitutional and void, in that it is an attempt, on the part of the legislature, to take away from the State Board of Land Commissioners "all power of disposition of the state lands," which power is, by the constitution, vested in said Board.

Very truly yours,

FRED FARRAR,
Attorney General.

By WENDELL STEPHENS,
Assistant.

(August 5, 1916.)

A candidate for primary nomination may be designated as such candidate by the assemblies of more than one political party, but the votes cast for him on different tickets at the primary election can not be cumulated.

Hon. Elroy C. Shelden,
County Clerk and Recorder,
Colorado Springs, Colorado.

Dear Sir: In answer to your letter of August 4, in which you ask if there is any provision in the Primary Election Law prohibiting one political party from designating at its assembly the names of candidates who have been designated by another political party.

As I understand it, your question is: Does the law prohibit any person being designated upon more than one primary ballot?

In reply I beg to say that it does not. A candidate may seek nomination through the primaries upon as many different party tickets as he may be able to secure designation.

I might add, however, that his candidacy on each ticket stands alone. That is, he is not entitled to cumulate his votes received on various ballots, but his candidacy for nomination on the Democratic primary ballot, for illustration, is separate and distinct from his candidacy on the Republican primary ballot,—differing in this respect from the general election.

Yours very truly,

FRED FARRAR,
Attorney General.

(August 11, 1916.)

The State Auditing Board may legally authorize a member of the State Board of Health to attend a meeting of state and territorial authorities called by the U. S. Surgeon General to consider the question of coping with an epidemic like infantile paralysis.

To the State Auditing Board:

My opinion has been asked relative to a requisition this day presented by the State Board of Health asking authority to expend a sum not to exceed one hundred fifty dollars out of their funds appropriated for traveling expenses for the expenses of a representative of the Board on a trip to Washington to confer with the United States Public Health Service.

I beg to advise that I have inquired into the occasion for this requisition and I find that the secretary of the State Board of Health received, under date of August 9th, a telegram from the acting Surgeon General at Washington, D. C., which reads as follows:

> "Under authority Public Health Law nineteen hundred two conference of state and territorial health authorities with Public Health Service is called to meet this office ten A. M. Thursday, August seventeenth, to consider poliomyelitis situation and bring about greater uniformity in methods of control representative of your state urgently requested wire name of your delegate."

I find that the federal statute referred to in the telegram authorizes the Surgeon General of the Public Health and Marine Hospital Service of the United States to call conferences of representatives from the state and territorial boards of health, quarantine authorities and other state health officers whenever, in his opinion, the interests of the public health will be thereby promoted.

Poliomyelitis is the scientific term for infantile paralysis. According to press reports this disease is epidemic in certain places of the United States and I understand that it is the desire of the federal authorities to secure the co-operation of the various state health officers in the fight being waged against this disease.

It is suggested that the decision of the Court of Appeals of the State of Colorado in the case of Carlisle vs. Hurd, 3 Colo. App., 12, prohibits the expenditure of money by state officers outside the state unless expressly authorized by the legislature. However, I believe that a careful reading of this opinion will not bear that construction. It is true that the opinion held that under the existing law the deputy insurance commissioner was not authorized to examine foreign insurance companies doing business in Colorado at their home office, and, inasmuch as he was not authorized to make the examination at the home office, his voluntary act in so doing did not authorize him to receive his expenses from the state.

I can see a distinction between the facts in the case of Carlisle vs. Hurd from the existing condition of affairs here. As the law stood when the case of Carlisle vs. Hurd was decided, it was not absolutely necessary for the insurance department to make the examinations of foreign companies outside the state. It could require the company to submit their books and papers here within the state, although this would be decidedly inconvenient. On the other hand, if a disease became epidemic throughout the country, it might be absolutely necessary for our state health officers to co-operate with other health officers, both state and federal, and their duties might be of such a nature as to imperatively require the expenditure of money in traveling without the state.

I assume, for the sake of this opinion, that it is necessary for the public health to take such measures as may be necessary to prevent the spread of this disease and I believe it is within the discretion of the State Auditing Board to grant this requisition.

Yours truly,

FRED FARRAR,
Attorney General.

(August 15, 1916.)

The Industrial Commission cannot legally insert in self-insuring permits a clause terminating them in case the permittee insures his risk without the Commission's consent.

The Industrial Commission of Colorado,
Denver, Colorado.

Gentlemen: I have your inquiry of recent date wherein you request an opinion as to whether the Workmen's Compensation Law vests in the Industrial Commission the power to insert in self-insurance permits a clause terminating the permits if the

permittee should insure the whole or any part of his risk without first obtaining a separate written consent of the Industrial Commission thereto.

Section 11 of the Workmen's Compensation Act, (1915 Session Laws, page 524) provides that every insurance corporation transacting business in this state which insures employees against liability for compensation under the provisions of the act "shall file with the commission its classification of risks and premiums relating thereto, and any subsequent proposed classification of risks and premiums, together with basic rates and schedules, if a system of schedule rating be in use, *none of which shall take effect until the commission shall have approved the same as adequate for the risks to which they respectively apply.*"

Said Section 11 also contains the following provision:

> "Every contract for the insurance of compensation herein provided for, *or against liability therefor,* shall be deemed to be made subject to the provisions of this act, and all provisions thereof in such insurance policy inconsistent with the provisions of this act shall be void."

If an employer procures a permit to carry his own risk and subsequently takes out indemnity insurance to cover any loss which the employer may sustain under the Workmen's Compensation Law, such indemnity insurance is a contract "against liability therefor," and therefore comes within the provisions of said Section 11 and the insurance company carrying such indemnity insurance must submit its rates to the commission and can charge such rates as are approved by the commission only.

Therefore I am of the opinion that the law does not vest in the Industrial Commission the authority to insert in self-insurance permits a clause terminating the permits if the permittee should insure the whole or any part of his risk without first obtaining the written consent of the Industrial Commission for the reason that the employer has the right to carry all the indemnity insurance he may desire to carry; but such insurance being a contract against liability for compensation, the insurance company carrying such indemnity insurance cannot charge less than the basic rate approved by the Industrial Commission for direct compensation insurance on the same character of risk.

Yours very truly,

FRED FARRAR
Attorney General,

By WENDELL STEPHENS,
Assistant.

(August 25, 1916.)

Procedure under the Absent-Voter Act (S. L. 1915, p. 221).

The Election Commission of the City and County of Denver,
Isham R. Howze, Secretary,
Denver, Colorado.

Gentlemen: Your letter of August 25th is at hand requesting an opinion on the proper method of procedure for your body to enforce the act entitled "An Act concerning elections, and permitting absent electors to vote by mail," approved April 12, 1915 (S. L. 1915, page 221).

The law in question is rather loosely drawn. It follows, in some respects, the legislation of other states, notably Kansas, Washington and Oregon. Of course it is your duty to give effect to every part of the act so far as this can be done without indulging in executive legislation and without violating the customary rules of statutory construction.

It is well known that there are numerous differences in the kinds and number of offices to be filled in different counties, especially as between Denver and the other counties of the state. Therefore it has been suggested that in Denver, for instance, a separate official ballot ought to be printed for the use of voters from other counties making the arrangement for practical purposes more convenient than would otherwise be the case. The law requires (S. L. 1915, page 222, Section 2) that the non-resident voter be given

> "an official ballot, printed like the official ballots as to national and state candidates, constitutional amendments, initiated and referred laws, district, county and precinct candidates, and such voter shall write in the names of such candidates in the blank space left for that purpose not printed thereon as he may desire to vote for and mark the same as any resident voter, and shall fold the same and hand it to the judges, as in the case of a resident voter."

This language seems to contemplate the use of ballots exactly like the ballots employed by the voters resident in the county.

In answer to the objection that the absence from the Denver ballot of certain offices, such as sheriff, county treasurer, assessor, county clerk and recorder, etc., makes it impossible for the non-resident to use the Denver ballot successfully for his own county where such omitted offices are to be filled by vote, I can only say that the remedy, in my judgment, lies either in having the Denver official ballot prepared with a larger amount of blank space, thus allowing the writing in of both office and name of the candidate, or else in the fact that the larger number of candidates in Denver for the general assembly will furnish sufficient space to be appropriated for the desired purpose. Similar difficulties can be met in

other counties by using a little foresight in the preparation of the ballot.

Attention is called to the requirements in both the primary and the general election statutes that either one or more blank spaces must follow the printed names of persons designated or nominated for each office, according to the number to be nominated for or elected to the particular office. The natural ingenuity of the voter will doubtless suggest some practical way of adapting such spaces as required.

Since the ballot must be liberally interpreted to carry out the intent of the voter, it is felt that no problems will arise in this connection which cannot be satisfactorily solved at the election.

Yours very truly,

FRED FARRAR,
Attorney General,
By FRANCIS E. BOUCK,
Deputy.

(August 31, 1916.)

Fee payable to county clerk for filing chattel mortgage in view of the enactment of S. L. 1915, page 141, Sec. 2a.

Mr. J. A. Burnett,
Care The Burnett Building & Loan Association,
Denver, Colorado.

Dear Sir: Replying to your recent inquiry as to whether the fee payable to the county clerk for filing a chattel mortgage ought to be twenty-five cents, as provided by Session Laws of 1915, page 141, Section 2a, or fifty cents, as provided by the Revised Statutes of Colorado, 1908, page 287, Section 516, I beg to say that there is some question as to the validity of the 1915 provision, because the act in which that provision is found claims to be an amendment of certain specified sections of the old law, not including the particular section of the old law in which the fifty cent charge is provided for. This raises a constitutional question, the general rule being that, where the proposed law does not fall reasonably within the title, that portion which is outside the title must be rejected. Under the circumstances this office cannot say that the county clerk is wrong who takes the ground that it is necessary to pay fifty cents for the filing.

It is unfortunate that the General Assembly was not more careful in turning out a law that was primarily intended to reduce the charge for filing chattel mortgages to a uniform basis of twenty-five cents. This ought to be remedied at the very next session of our legislature and doubtless will be.

Very truly yours,

FRED FARRAR,
Attorney General.
By FRANCIS E. BOUCK,
Deputy.

(September 1, 1916.)

Duty of county clerk as to publication of lists of nominations.

Mr. George E. Hosmer,
Chairman, Executive Committee,
Colorado Editorial Association,
Denver, Colorado.

Dear Sir: Your letter of August 28 requests my interpretation of "that part of the law in regard to the publication of lists of nominations which says that the lists must be published in at least two newspapers of opposite political faith within each county, and that where there are daily newspapers, publication must be made in them."

The provisions evidently referred to are found in Section 2159, R. S. 1908, requiring the county clerk of each county to publish the list of nominations just prior to the general election. Among other things it is there said:

> "The county clerk shall make such publications daily in counties where daily newspapers are published, but if there be no daily newspaper published within the county, one publication in each newspaper shall be sufficient."

Of course you are aware that a daily newspaper is such in a legal sense only if it answers the requirements contained in Section 3931 and Section 3932, R. S. 1908.

The county clerk is further required by Section 2159 to publish the list of nominations in two newspapers supporting the two political parties which at the last preceding state election cast the largest and the next largest number of votes.

It follows that if there is published in the particular county a daily newspaper which can qualify under the definition given in the section above referred to and such newspaper represents one of the two political parties polling the largest and the next largest number of votes at the preceding state election, it is the unquestionable duty of the county clerk to select this newspaper for publication of the list of nominations in preference to a newspaper which is not a daily.

If both parties are thus represented by daily newspapers, it is the county clerk's duty to select two daily newspapers so representing those parties, for the publication of the list.

The practical question of compelling a county clerk to perform his duty in this respect is a rather difficult one, because the time is so short within which the duty must be performed, and a court might find it impossible to take action effectually in time to have the law enforced. Should a county clerk express himself as intending to publish in newspapers other than dailies when there

are dailies entitled to publish the list, the time might possibly suffice to present the matter to court and endeavor to compel the county clerk to do his duty under a court order.

Very truly yours,

FRED FARRAR,
Attorney General,

By FRANCIS E. BOUCK,
Deputy.

(September 1, 1916.)

Vacancies may be filled on official ballot to be voted on at the general election, but not on primary ballots.

C. E. Dresback,
County Clerk and Recorder,
Silverton, Colorado.

Dear Madam: I am in receipt of your inquiry as to the filling of vacancies.

The Primary Law of 1910 provides for the filling by party committees of "vacancies in nominations *occurring* after the holding of any direct primary election." There is, of course, no such thing as the filling of a vacancy on the primary ticket itself. If for any reason a designation for nomination to a particular office fails, either by the death of the person designated, or his declination, or from any other cause, the law does not provide for the substitution of any other person.

Where a person has been selected as the nominee at a primary election, and that person ceases to be a candidate, either by resignation, death or otherwise, then the party may, through the proper channels, appoint some other candidate to fill the vacancy on the official ballot at the general election.

Whether the party has a right so to nominate a candidate for the regular ballot to be voted on at the general election, even where no attempt was made by the party under the Primary Law to select a candidate, is a question that has not been decided by our courts, so far as we are aware; nor are we at this time prepared to express our opinion on this point.

Very truly yours,

FRED FARRAR,
Attorney General,

By FRANCIS E. BOUCK,
Deputy.

(October 7, 1916.)

The successful primary candidate of a political party can accept an independent nomination for the same office (Pease v. Wilkin, 53 Colo. 404); he may also be designated to fill a vacancy on the ticket of another party.

A county clerk has no power to determine whether a primary candidate nominated by the writing in of his name is or is not affiliated with the party nominating him.

E. L. Boillot,
County Clerk and Recorder,
Fort Morgan, Colo.

Dear Sir: I have your favor of the 20th ult., submitting certain questions with reference to the Primary Election Law.

With one exception the questions so presented are novel, not having been passed upon by the courts of this state, or so far as I have been able to determine, of any other. I have given them careful consideration, however, and have reached the following conclusions:

> 1st. "A was designated for the office of County Judge, by a Party Assembly, but failed to file acceptance within the time specified by law. At the Primary voters write his name for that office on a party ballot, which votes are sufficient to give him the largest number of votes cast for any person, for that particular office. Since the Primary A has filed a petition with this office for independent nomination for the same office. Is he entitled to the nomination as a party candidate and Independent also?"

If A was properly nominated at the primary election as a candidate of a political party, this precise question has been answered by our Supreme Court in the case of Pease v. Wilkin, et al., 53 Colo. 404. Upon the authority of that case I conclude that A is entitled to have his name placed upon the ballot at the general election, both as a candidate of his party and as an independent candidate.

> 2nd. "B receives votes at primary on one of the party ballots (name written in), but since the primary the vacancy committee of a different party than the one casting votes for him at the primary, has filed a certificate designating B to fill vacancy caused by the withdrawal of the regular nominee whose name appeared on the official primary ballot. Is he entitled to both nominations?"

As our statute contains no provision requiring vacancy committees to fill vacancies upon the ticket by a designation of persons not nominated by other parties, I conclude that B is entitled to have his name go upon the ballot as the candidate of both parties.

3rd. "Some of the parties failed to designate candidates for some of the offices, and the voters wrote in names for said offices. In such cases, is it up to the County Clerk to determine whether these persons are affiliated with the party from which they received the votes, or any other party. If so, how should he proceed?"

Our statute contains no provision for the determination by the county clerk of the status of candidates as members of the respective political parties nominating; nor does it anywhere provide a test or measure of party membership.

Perhaps this statement sufficiently answers your question. If not, I should be glad to have you write me further, stating in detail the exact problem confronting you, upon which you require advice.

Very truly yours,

FRED FARRAR,
Attorney General,

By FRANK C. WEST,
Assistant.

(October 21, 1916.)

Method of registering voters in rural precincts or in precincts within incorporated towns.

Right of a candidate to be in precinct polling place during casting and counting of ballots.

Where electioneering prohibited.

Mere illiteracy does not entitle voter at general election to receive aid from election officials.

Mr. Raymond Miller,
Chairman, Democratic State Central Committee,
Albany Hotel, Denver, Colo.

Dear Sir: In response to your inquiries I beg to advise:

1. A voter in any rural precinct or in any precinct within an incorporated town (of not more than 2,000 population) may be registered by any one of the three election judges in the manner prescribed in Section 2166 of the Revised Statutes of Colorado, 1908, namely, when one of the judges knows the person to be a qualified elector of the precinct such judge signs his name on the registry list beside the name of the voter, and the voter is thereby duly registered.

2. It has been a general custom in many counties of this state to allow any candidate to enter and to be present in whatever precinct polling places he chooses during the time the ballots are being cast or counted. Under Section 2213 of the Re-

vised Statutes, 1908, a candidate may be appointed as a regular watcher or challenger for any precinct. He may under that section be appointed as an alternate to a watcher or challenger, and he may act as one of the persons designated by a watcher or challenger to remain in and about the polling place during the counting of the votes and certifying of the returns. The precinct in which he acts need not be the precinct wherein he resides.

3. Section 2377 of the Revised Statutes of 1908 says that no one shall do any electioneering on election day within any polling place, or in any public street or room, or in any public manner, within 100 feet of any polling place. The violation of this provision is a misdemeanor.

4. At a general election, under the 1912 Headless Ballot Law, found in Session Laws 1913, at page 685, only those who are suffering from an "absolute and total disability" can be assisted while preparing their ballots in the election booth. Mere illiteracy is not sufficient to entitle a voter to aid from the election officials.

Trusting that the above covers the points on which you wish to be enlightened, I am,

Very truly yours,

FRED FARRAR,
Attorney General,
By FRANCIS E. BOUCK,
Deputy.

(November 10, 1916.)

Proper time for county clerk to begin official canvass of votes, in view of Absent Voter Act of 1915.

Absent voter's ballot, how interpreted.

Mr. Elroy C. Shelden,
County Clerk and Recorder,
Colorado Springs, Colo.

Dear Sir: Replying to your letter of the 3rd, I beg to advise you as follows:

(1) Section 2272 of the Revised Statutes of Colorado, 1908, provides that the official canvass shall be made on the tenth day after the election or sooner in case all the returns are in; but, in view of our Absent Voter Act, we cannot be sure that all the returns are in at any particular time. So I suggest that practical complications can be avoided by the county clerk's beginning his official canvass on the tenth day after election (that is, on November 17, 1916), rather than before. This will give the

county clerk a chance to receive such ballots as are sent in by absent voters up to the latest day for beginning the canvass. When a ballot is cast in a precinct remote from a county seat or suffering from lack of transportation facilities, the delay in transmitting the ballots to the voter's home county may readily, with other natural delays, consume the maximum period. While it would not be fatal to make the canvass earlier, there is greater danger in the latter case that a supplemental return to the State Canvassing Board might become necessary.

(2) Where an absent voter misspells the name of a candidate, the canvassing board ought to apply the rule that the intention of the voter shall be given effect wherever possible. If the misspelling is not such as to make it doubtful who was intended, the vote ought to be counted for the particular candidate.

(3 Where a name is written in in the blank space on the ballot, under a printed name, the cross-mark ought to be placed after the written name in order that the vote can be counted for the person whose name is so written in. (See Riley v. Trainor, 57 Colo., 155.)

Inasmuch as the printed name does not, in the case of an absent voter's ballot, represent a candidate in the voter's own county, the strict rule laid down in the Riley-Trainor case, requiring a cross-mark in addition to the written name, may possibly not apply. As to this point, I express no opinion one way or the other.

Owing to the difference between the ballots in different counties, there may be cases where the voter will find it impossible or difficult to adjust a ballot to his home candidates, except by considerable modification or writing in. In such cases, if the intention of the voter is clear, it probably ought to be given full effect except where a positive statutory requirement has not been complied with.

Yours very truly,

FRED FARRAR,
Attorney General,

By FRANCIS E. BOUCK,
Deputy.

(November 14, 1916.)

Proceedings before the Industrial Commission, giving opinion of Attorney General Farrar, as to the Industrial Commission's inability to delegate its power of determining adequate rates.

On the 14th day of November, 1916, The Industrial Commission of the State of Colorado having under consideration a proposed resolution reading as following:

"WHEREAS, in the opinion of this Commission, no schedule of rates or of merit rating is adequate for purposes of Section No. 11 of the Workmen's Compensation Act unless such schedule embodies the proposal of a practicable method whereunder the application of such schedule to the individual risk is to be determined (through inspection, stamping and payroll auditing) by the Colorado Compensation Rating Bureau, or is determined (through inspection, stamping and payroll auditing) by the Industrial Commission of Colorado; and

"WHEREAS, the schedules of rates and of merit rating hitherto filed by the ..... Company do not embody such a proposal;

"NOW THEREFORE BE IT RESOLVED, That, in the opinion of this Commission any and all schedules of rates and of merit rating filed by said ..... Company, are inadequate within the meaning of said Section No. 11 of the Workmen's Compensation Act, and this Commission's approval of such schedules is hereby withdrawn."

heard arguments both in favor of and in opposition to said resolution from counsel representing various insurance companies interested.

After having heard arguments from Mr. Charles W. Waterman, Mr. Frank C. Goudy and Mr. William E. Hutton representing certain companies termed the "Associated Companies" in opposition to the adoption of the proposed resolution, and from Mr. L. Ward Bannister representing various other companies in support of the adoption of the resolution, the Commission requested the Attorney General to state orally his view of the right of the Commission to adopt the resolution. Whereupon, the Attorney General delivered the following oral opinion:

Attorney General Fred Farrar:

First, I wish to refer to the suggestion made by Mr. Bannister to the effect that counsel for the associated companies have no standing here. I would answer Mr. Bannister by saying that the Workmen's Compensation Law of this state has opened up a new field of endeavor for this Commission. Necessarily the Commission and those associated with it have, in a measure, been feeling their way in a virgin field. It has been necessary for the Commission to proceed with caution and the hearing today is intended to secure a proper legal discussion relative to the rights and duties of the Commission under the law rather than the question of the adequacy of the rates suggested or proposed. Furthermore, the associated companies are here substantially at the command of the Commission, they having been granted this opportunity to show cause why the proposed resolution should

not be adopted. It therefore appears to me that they are properly before the Commission, not only in obedience to its summons, but also to advise with the Commission as to the law under which the Commission acts.

The question presented relates to the powers and duties of the Commission. I will devote my discussion to the law as I see it. I have studied the question with Mr. Green, Manager of the State Fund, and also with one of my associates, Mr. Stephens, but I wished to hear the arguments of counsel before arriving at a final conclusion.

As I understand it, the suggestion made to the Commission is that there be established a Rating Bureau, of which all companies writing compensation insurance in this state must become members; that unless they do become members, their schedules or basic rates will *ipso facto* be held to be inadequate.

The plan is similar to that followed by the fire insurance companies of this district, wherein they maintain an organization called the Rocky Mountain Fire Underwriters' Association. As I understand it, all fire policies are submitted to this association, to be checked with the rates and manual rules adopted by the companies belonging to the association.

Such an organization has been held to be illegal by the courts of the State of New Jersey in the case of McCarter vs. Firemen's Insurance Company, et al, 73 Atl., 80. In this case, decided in 1909, the New Jersey Court of Errors and Appeals held that the organization in question was in restraint of trade and therefore contrary to law, or, to use the popular term, declared the organization to be a trust. This New Jersey decision was cited with approval by the Court of Appeals of this State in Denver Jobbers' Association vs. People, 21 Colo. App., 326, although the Colorado case did not involve fire insurance organizations. I therefore assume that the decision of the New Jersey court is the law of this state except as it has been modified by subsequent legislation. It has possibly been so modified. In the year 1913, the 19th General Assembly of the State of Colorado passed an act defining and prohibiting trusts. (Session Laws 1913, page 613.) After defining a trust and declaring such combinations to be unlawful and void, the following proviso was inserted:

> "Provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act the object and purposes of which are to conduct operations at a reasonable profit or to market, at a reasonable profit, those products which cannot otherwise be so marketed."

The legal significance of this proviso has not been determined in this state. It is not necessary, at this time, to determine whether it goes to the substance of the law or merely constitutes a rule of evidence, throwing upon the state the necessity of negativing the exceptions contained in the proviso.

In the consideration of the plan for the organization of a similar bureau for companies writing workmen's compensation in this state, we have, however, a further legislative modification in that the act under which this Commission is operating requires that adequate rates shall be charged for this class of insurance; rates adequate to produce a proper reserve. The act does not define a proper reserve, neither do I recall, at this time, any other law of the state which fixes a proper reserve. As a matter of fact, the requirements of this state for companies writing this class of insurance have been very liberal and very indefinite. It may be that, in order to determine what is an adequate reserve, the Commission would have to go to the rules of actuaries rather than to any legislative expression in the state. However that may be, the duty of establishing adequate rates, or rather, the duty of determining whether rates are adequate, and the duty of maintaining such rates, is vested with this Commission.

Mr. Commissioner Williams asked a question of some gentleman a few moments ago as to whether or not the term "establish" in this connection meant also to "maintain." I believe that it does. The law of this state gives to this Commission not only the right but the duty to see that adequate rates are charged, and I believe that this means necessarily the duty to see that adequate rates are maintained. It is my opinion that this duty devolves upon the Commission and that it is a duty which cannot be delegated under the existing law of this state.

The rating bureau which it is suggested be established is an attempt to delegate to an independent or unofficial body this duty, and, connected with the proposed plan, is the coercion of all companies doing business in this state into becoming members and paying their proportionate cost of maintaining the bureau. The suggested resolution which is before the Commission for consideration today is, in my opinion, beyond the power of the Commission to enforce.

In answer to the question of the chairman as to how the Commission can maintain its own bureau, I can only say that this law is new—not only new in the State of Colorado, but lacking in precedent in other states—and we will find with experience that material modifications are necessary. It is a problem, if it be a problem at all, for the legislature rather than for this Commission, which is a creature of statute and therefore without power except as expressly or by necessary implication given in the statute. It may be that the legislature may determine that it is best to give to the Commission authority to delegate the duty of inspecting the application of the basic rates established by the Commission, or it may be that the legislature will see fit to appropriate a sufficient sum or otherwise provide the means whereby the Commission itself may conduct such a bureau, but, until the legislature does grant this power, no matter how advisable it may be that the Commission should have the power, nevertheless, in my judgment, the Commission cannot act.

I see the advisability of having some means for procuring the information which it is intended shall be procured through this rating bureau. The Commission or its officers have definite means of knowing what the basic rates upon which each company expects to write its risks in this state are, but you have no means under the present law of determining whether or not these rates are applied to the various risks. Let me make that clear. I believe the Commission has the power, at this time, to do this, but it is lacking in the necessary machinery, in other words, is lacking in the means. The proposed rating bureau is merely an attempt to supply these means, but, no matter how advisable it may be to establish this bureau, under the existing law of this state, I believe it is beyond the power of the Commission to delegate this duty.

I would suggest that my opinion is that the Commission having the power, but not the means to make this investigation, is nevertheless without the power to delegate it. This is different from the theory advanced by Mr. Goudy and Mr. Waterman, but the result is the same.

In conclusion, I wish to say that this opinion is in no wise inconsistent with the opinion rendered by Mr. Wendell Stephens of my department upon the 24th day of August, 1916, wherein he ruled that the Commission might properly contribute to the expense of maintaining a rating bureau inasmuch as the information obtained was necessary for the guidance of the Commission itself in the administration of the state fund.

(November 21, 1916.)

A county's valid floating indebtedness beyond the amount of its annual appropriation can be paid by special levy.

A person elected to fill a vacancy may qualify as soon as the official canvass is completed.

Mr. Charles L. Blake,
County Attorney,
Montrose, Colo.

Dear Sir: Your letter of recent date presents a common situation in the counties of Colorado.

The unforeseen indebtedness arising from legitimate services beyond the control of the county authorities cannot, of course, be paid by county warrants if the amounts are beyond the appropriations made by the board in the annual appropriation resolution, nor would Section 1321 of Mills' Ann. Stat. (1912), to which you refer and which is found also in Revised Statutes of 1908, Section 1375, be of any assistance to you in this connection, since that section is limited wholly to warrant indebtedness.

However, the Supreme Court of this state, in the case of Bent County vs. Santa Fe Co., 52 Colo., 609, decided that the act found in the Session Laws of 1891 at pages 111 to 112 is still in force in part, giving the county board the right to make a levy for the purpose of covering outstanding floating indebtedness. The section to which you refer (Sec. 1321, M. A. S. 1912) was enacted two years later and is found in the Session Laws of 1893, page 100. If you will examine the 1891 act above referred to, together with the opinion in the Bent County case just cited, I think you will have no difficulty in meeting the situation that confronts your board of county commissioners in Montrose County.

On the second matter covered by your letter, I beg to say that under our constitution and statutes a person elected to fill a vacancy may take the oath of office and qualify at any time after the official determination of his election, and it then becomes the duty of the one holding by appointment to yield his place.

Very truly yours,

FRED FARRAR,
Attorney General,
By FRANCIS E. BOUCK,
Deputy.

(December 7, 1916.)

Right of a member of the General Assembly to collect the entire biennial salary even though he accepts a federal office before his term expires.

Hon. Harry E. Mulnix,
Auditor of State,
Denver, Colorado.

Dear Sir: You have asked me whether you can legally issue a warrant to Samuel J. Burris for the sum of $335.00, covered by a regular voucher bearing the signatures of the President and the Secretary of the State Senate, as the balance claimed to be due the said Burris on his salary as State senator for the biennial period 1915-1916.

It seems that shortly after the final adjournment of the Twentieth General Assembly of Colorado, which occurred on April 10, 1915, Senator Burris accepted a commission for the position of United States Marshal of the District of Colorado, to which he had previously been nominated, and after the adjournment referred to entered upon his new official duties. You are in doubt as to whether Section 8 of Article V of the State Constitution forbids the issuance of a warrant in the circumstances mentioned.

Section 8 provides:

> "No Senator or representative shall, during the time for which he shall have been elected be appointed to any civil office under this state; and no member of congress, or other person holding any office (except of attorney-at-law, notary public, or in the militia) under the United States or this state, shall be a member of either house during his continuance in office."

Compensation to members of the general assembly is paid under an amendment adopted in 1910 to Section 6 of Article V of the state Constitution, making the latter section read as follows:

> "Each member of the General Assembly, until otherwise provided by law, shall receive as compensation for his services the sum of one thousand ($1,000) dollars for each biennial period, payable at the rate of $7.00 per day during both the regular and special sessions, the remainder, if any, payable on the first day of the last month of each biennial period; together with all actual and necessary traveling expenses to be paid after the same have been incurred and audited, and the said members of the General Assembly shall receive no other compensation, perquisite or allowance whatever. No general assembly shall fix its own compensation."

It thus appears that the compensation of a state senator is the lump sum of $1,000 for each biennial period. Payment is to be made on a per diem basis during the regular session and during any special session, and any remaining balance is to be paid near the end of the biennial period.

Where the member has attended the regular session and no special session has been held (in other words, where it appears, as in the case of Senator Burris, that none of the legislative duties resting upon the member have been left unperformed), it is my opinion that he has earned his entire biennial salary at the moment of final adjournment of the general assembly; and his subsequent assumption of a federal office does not serve to deprive him of his right to claim full compensation.

Section 8 of Article V has no application to such a case. A different question would be presented if a special session had been held after the acceptance of the federal position.

You are therefore respectfully advised that Senator Burris's claim is in all respects legal and that a warrant ought to be issued in payment thereof.

Very truly yours,
FRED FARRAR,
Attorney General,
By FRANCIS E. BOUCK,
Deputy.

(December 20, 1916.)

What are "contingent" and "incidental" funds; power of the State Auditing Board to transfer from one department to another.

Hon. H. E. Mulnix,
Auditor of State,
Denver, Colorado.

Dear Sir: I have your letter of this date stating that the State Auditing Board has sent you a list, which you enclose, wherein it is proposed to transfer from various funds to various funds as indicated in the list. They ask to be advised as to the legality of the transaction.

It appears that various departments have, at this time, deficits in their incidental funds. For illustration, it appears from the list enclosed with your letter that the Governor has, or will have if all bills are paid for the biennial period just closed, a deficit of approximately $850; that the Secretary of State, in all of his departments, will have a deficit of approximately $3,700; the Treasurer, $700; the Auditor, $660; the Attorney General, $20, and so on, these figures being approximate only. On the other hand, it appears that there remains a balance in the incidental fund appropriated to the Supreme Court, the Court of Appeals, the Board of Charities and Corrections, the Bureau of Child and Animal Protection, and that in various other funds appropriated for various expenses to the different officers, boards or bureaus, there remains a surplus. In other words, it appears that certain departments require, in the aggregate, approximately $10,810, and it is proposed to transfer this amount from other departments having a surplus in their incidental or expense funds.

The only question, as I see it, is the definition of the terms "incidental" or "contingent" fund. The act creating the auditing board, Chapter 76, at page 167, Session Laws 1911, provides as follows:

> Section 5. Said Auditing Board may transfer from the contingent and incidental fund of any Department, Board or Bureau having a surplus therein to any Department, Board or Bureau having a deficit in its contingent and incidental fund such sums as said Auditing Board may deem necessary."

There is no definite meaning to the words "incidental" and "contingent" as these words are used by the legislature of this state in appropriating money for various departments, although, if anything, the incidental fund is more definite than the others; it consists, as a rule, of a definite sum appropriated for incidental expenses and divided between certain boards and bureaus. This

lack of definiteness may be illustrated by showing that for a number of years there has been appropriated to the Governor a contingent fund for official and semi-official expenses, to be determined by him, and there has been appropriated to the Attorney General a fund called his contingent fund, which is for the employment of special counsel. It is obvious that these contingent funds are not at all similar. One is appropriated for a very broad purpose and the other for a limited purpose. Again, we find that there has been appropriated to the Attorney General not only a certain amount in the incidental fund, but that another fund for various expenses has been appropriated, termed the emergency fund. These two funds are substantially interchangeable. Other illustrations might be given.

An examination of the appropriation acts of the legislature will disclose that the terms "emergency," "contingent" and "incidental" have been used in a general sense and frequently interchangeably.

It is, therefore, my judgment that the language of the act quoted, when it refers to the contingent and incidental fund, is used in a broad sense to specify the character of the fund rather than to define any specific fund or any two specific funds.

In so far as the auditing board seeks to transfer from the incidental fund, using the word in the restricted sense, of any department, board or bureau having a surplus, to the incidental fund of any other department, board or bureau having a deficit, there is, of course, no question. Where the transfer is sought to be made from a traveling fund, as is true of some of these items, some question might be raised unless a traveling fund, as is true under the practice of the executive department of this state, be available for transportation expenses and living expenses while the officer in question is traveling on his official duties.

In my judgment the intent of the act is sufficiently broad to include this sort of funds and I believe that the transfers mentioned can legally be made. Otherwise, the rather anomalous position occurs of having a number of unpaid bills incurred by various departments, or, if these bills be paid, a deficit in so far as the incidental fund of these particular departments is concerned, and, on the other hand, a surplus in the incidental or similar funds of various other departments, which will lapse by reason of the expiration of the term for which the appropriations were made, that is, the fiscal biennial period.

These unexpended balances aggregate a larger amount than that necessary to be transferred, and the amount which will lapse will be in funds created by appropriations for purposes identical with or generally similar to those in which the deficit would appear.

Therefore, my conclusion is that the transfers suggested may be made to the incidental fund and be apportioned, pursuant to

the statute quoted, to the departments, boards or bureaus requiring it.

Yours very truly,

FRED FARRAR,
Attorney General.

(January 6, 1917.)

Where the annual salary of a state officer is a fixed sum, how calculated.

Hon. H. E. Mulnix,
Auditor of State.
Denver, Colorado.

Dear Sir: You have requested my opinion as to the proper method of determining sums to be paid the various state officers as compensation for their services up to the expiration of their term on the second Tuesday of January (being January 9, 1917).

Where (as, for illustration, in the case of the Governor) the statutes provide for an annual salary and the law also provides for a definite term of a specified number of years, it is my opinion that the officer in each case is entitled to the exact salary stated.

Section 1 of Article IV of the Colorado Constitution and similar provisions establish what may properly be termed a special fiscal year for salary purposes, by providing that the officer "shall hold his office for the term of two years beginning on the second Tuesday of January next after his election."

You will, therefore, in the case of an officer with a two-year term, issue a warrant for the difference between a sum twice the stated salary and the aggregate sum already paid him on account of his two-year term. This will be a comparatively simple calculation in each particular case. Where the term is longer than two years, the same principle ought, of course, to be applied.

Very truly yours,

FRED FARRAR,
Attorney General,

By FRANCIS E. BOUCK,
Deputy.

SYNOPSES OF SOME ADDITIONAL OPINIONS.

(All page references below are to the Attorney General's official Opinion Book No. 7.)

(P. 225: To Senator J. S. Hasty, Chairman Finance Committee, State Senate, January 28, 1915.)

Partial veto of governor.

Where the governor vetoes a portion of some specific item in a general appropriation bill, the portion approved becomes a valid appropriation over which the general assembly has no further control, although the assembly may reinstate the portion vetoed and override the veto.

(P. 237: To John A. Martin, February 15, 1915.)

Foreign fraternal insurance corporations.

A foreign fraternal benefit society operating on the lodge plan is entitled to admission upon filing its articles of incorporation, etc., with the Commissioner of Insurance without filing in the office of the Secretary of State.

(P. 239: To John E. Ramer, Secretary of State, February 16, 1915.)

Foreign corporation excluded for identity of name.

A foreign corporation bearing the same name as a domestic corporation cannot be admitted here during the life of the latter, even if this is dormant because of delinquency in payment of license tax.

(P. 250: To Herbert B. Gee, February 25, 1915.)

Publication of city and town ordinances.

The publication of city and town ordinances required by law must be made in newspapers as defined in R. S. Colo., 1908, Sec. 3931.

(P. 252: To John E. Ramer, Secretary of State, March 3, 1915.)

Bankruptcy discharge not equivalent to dissolution.

A corporation which has received its discharge in bankruptcy is not thereby dissolved, and a certificate of such discharge cannot be filed in lieu of a certificate of dissolution.

(P. 254: To H. E. Mulnix, Auditor, March 5, 1915.)

Special compensation for committee of members-elect of the legislature.

The committee of one senator-elect and two representatives-elect, appointed by the outgoing Secretary of State under R. S.

Colo., 1908, Sec. 6215, for the purpose of examining and verifying the accounts of the auditor and the state treasurer, are entitled to special compensation for such service.

(P. 286: To Millard Fairlamb, April 20, 1915.)
Irrigation district warrants.

The warrants issued by an irrigation district are not receivable in payment of state, county, municipal or school district taxes. No opinion is expressed as to whether such warrants are receivable in payment of irrigation district taxes.

(P. 307: To Miss Mollie O'Bryan, Public Trustee, May 29, 1915.)
Status of public trustee when county drops from second class.

Sec. 30, Art. V, Const. of Colorado, protects the public trustee appointed for a county of the second class from interference with term or salary when the county drops to a lower class by legislative reclassification.

The acts of a de facto officer are valid as to the public.

(P. 308: To John E. Ramer, Secretary of State, May 29, 1915.)
Incorporation fee of non-stock, non-profit association.

The only fee payable on incorporating a non-stock, non-profit association under Ch. 57, S. L. 1915, p. 166, is $15.00, and no certificate of authority is required.

(P. 318: To E. R. Harper, Commissioner of Insurance, June 25, 1915.)
Rebating and discrimination by insurance agents.

An agent writing a fire insurance policy for a church, educational, philanthropic or charitable institution cannot lawfully donate a portion of his commission to the insured, unless specified in the policy. (S. L. 1913, p. 356, Sec. 55.)

(P. 394: To State Board of Charities and Corrections, Nov. 9, 1915.)
Inspection of private eleemosynary institutions.

The State Board of Charities and Corrections may at any time and upon its own motion investigate private eleemosynary institutions.

(P. 408: To E. R. Harper, Commissioner of Insurance, December 10, 1915.)
Investments of fraternal benefit societies.

"First Mortgage Farm Loans Savings Bonds," issued under a Montana statute, are not state bonds within the meaning of our insurance law, and a fraternal benefit society cannot lawfully invest therein.

(P. 461: To E. R. Harper, Commissioner of Insurance, March 20, 1916.)
Dormant foreign insurance company not liable for 2% tax.

Where a foreign insurance company admitted to Colorado withdraws from the State and later is again admitted, the State is not entitled to the 2% tax on premiums collected between withdrawal and re-admission.

(P. 481: To H. E. Mulnix, Auditor, April 29, 1916.)
Power of State Board of Charities and Corrections as to travel beyond the State.

The State Board of Charities and Corrections has authority (under Secs. 497 and 498, R. S. Colo., 1908) to incur expenses of trips outside of State.

(P. 487: To Public Utilities Commission, May 8, 1916.)
Power of Public Utilities Commission to require active compliance with statutory regulations.

The Public Utilities Commission can lawfully order the railroads to comply with general statutory requirements; for instance, as to fencing the right of way.

(P. 499: To E. R. Harper, Commissioner of Insurance, May 27, 1916.)
Insuring against breakage of eye-glasses and spectacles.

A contract of a corporation (not a regularly organized insurance company) purporting to insure eyeglasses or spectacles against breakage, is in violation of the insurance code.

(P. 510: To Public Utilities Commission, June 12, 1916.)
Discriminatory rates where contract exists.

A special switching rate which is discriminatory within the meaning of the Public Utilities act is not rendered lawful by being expressly provided for in a contract entered into between the railroad and the shipper before the act was passed.

(P. 523: To State Auditing Board, July 5, 1916.)
Control over fractional mill levy of School for Deaf and Blind.

The revenue derived from the fractional mill levy for the School for the Deaf and Blind may be expended by the board of trustees without action of the State Auditing Board.

(532: To W. B. Fraser, Game & Fish Commissioner, July 25, 1916.)
Kinds of fishing prohibited.

The prohibition against catching fish with snag hooks, trot lines, or lines having more than 5 hooks thereon (S. L. 1909, p. 388; S. L. 1911, p. 414; see R. S. Colo., 1908, Sec. 2814) renders use of so-called Swede-board unlawful.

(P. 556: To Allison Stocker, State Treasurer, August 10, 1916.)
Investing the State Compensation Insurance Fund.

Under the 1915 Workmen's Compensation Act neither the State Treasurer nor the Industrial Commission can invest the moneys of the State Compensation Insurance Fund.

(P. 644: To Colorado Tax Commission, December 22, 1916.)
General school tax of county as affected by levy-limiting law.

The levy-limiting law (S. L. 1913, p. 557) does not repeal R. S. Colo., 1908, Sec. 5893, which imposes upon the board of county commissioners the duty of levying a general school tax within fixed limits.

The levy-limiting law changes the minimum limit mentioned in R. S. Colo., 1908, Sec. 5893, to the equivalent of 2 mills under the old law, by reducing the 2-mill minimum to such levy as will produce an amount equal to what would have been raised by a 2-mill tax levied in 1912.

It is the duty of the Colorado Tax Commission to approve an increase proposed for the purpose of raising the general school levy of the county to the legal minimum where a county has unlawfully dropped below this minimum.

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